

IN THE MATTER OF A BOARD OF INQUIRY PURSUANT  
TO THE HUMAN RIGHTS CODE, 1981, CH. 53, AS AMENDED;

AND, IN THE MATTER OF A COMPLAINT MADE BY  
MARGARET TOMEN, DATED AUGUST 6, 1985, ALLEGING  
INFRINGEMENT OF THE RIGHT TO EQUAL TREATMENT WITH  
RESPECT TO MEMBERSHIP IN A TRADE UNION, TRADE OR  
OCCUPATIONAL ASSOCIATION OR SELF-GOVERNING PROFESSION  
ON THE BASIS OF SEX BY THE ONTARIO TEACHERS' FEDERATION  
(OTF) AND THE ONTARIO PUBLIC SCHOOL TEACHERS FEDERATION  
(OPSTF)

AND, IN THE MATTER OF A COMPLAINT MADE BY LINDA  
LOGAN-SMITH, DATED MAY 19, 1988, ALLEGING INFRINGEMENT  
OF THE RIGHT TO EQUAL TREATMENT WITH RESPECT TO  
MEMBERSHIP IN A TRADE UNION, TRADE OR OCCUPATIONAL  
ASSOCIATION OR SELF-GOVERNING PROFESSION ON THE BASIS  
OF SEX BY THE ONTARIO TEACHERS' FEDERATION (OTF) AND  
THE ONTARIO PUBLIC SCHOOL TEACHERS FEDERATION (OPSTF)

### Final Decision

Board of Inquiry: Dr. D.J. Baum

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**Ontario English Catholic Teachers' Association**

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# I

In the first part of the decision, I will (a) set out the primary issues before me with particular reference to the claims of the Complainants that they have been discriminated against in a manner contrary to the Ontario *Human Rights Code* and, in that regard, the question as to the nature of a "defence" to such violation in terms of the establishment of a *special program* within the meaning of the *Human Rights Code*; (b) indicate the nature of injury to the Complainants' dignitary interests and the place and substance of expert testimony relating thereto; (c) review the role of the *Charter of Rights and Freedoms* in resolving the issues in this case; (d) comment upon what some Counsel opposing the complaints have called precedent binding upon me in coming to a decision.

## A. The Issues Delineated by the *Second* and *Third Interim Decisions*

### 1. A Review of the *Third Interim Decision*

The *Third Interim Decision* in this matter, 11 C.H.R.R. D/223 (Oct. 23, 1989), delineated the issues, the relevant evidence and the law which I must now consider. Accordingly, it seems appropriate to review certain aspects of that decision. It should also be noted that the *Second Interim Decision*, 11 C.H.R.R. D/104 (Feb. 16, 1989), has some bearing on the issues now before me as they relate to burden of proof.

The *Third Interim Decision* resulted from motions raised by those opposing the complaints following the Commission's case in chief. In effect, those opposing the complaints argued that the Commission had not made a *prima facie* case. I decided

to pass upon the essence of the motions without putting those who raised them to an election which might have followed if their initiatives were treated, in a legal sense, either as motions to dismiss or non-suit. Specifically, I ruled that I would determine on the basis of the evidence then presented by the Commission whether there was *prima facie* sufficient evidence to support the complaints.

In the result, I answered that question in the affirmative. The complaints of Margaret Tomen and Linda Logan-Smith, essentially the same, alleged a violation of what is now section 6 of the *Ontario Human Rights Code*. They stated that as teachers in Ontario's public elementary school system they were denied *equal treatment* with respect to membership in the Ontario Teachers' Federation [OTF], an occupational association of which they must be members as a matter of law if they wish to teach in the Ontario public elementary school system.

It is their claim that they were discriminated against because of their sex. They, like other female public elementary school teachers, were required as a condition of membership in the OTF, and more specifically as a result of an OTF By-Law, to become *statutory members* of the Federation of Women Teachers' Association of Ontario [FWTAO]. Thus, they have been denied the right to become *statutory members* of the Ontario Public School Teachers' Federation [OPSTF], the association of their choice. That is, they were compelled to become members of FWTAO on the basis of their sex. Similarly, male public elementary school teachers are required as a condition of membership in the OTF to become *statutory members* of the Ontario Public School Teachers' Federation. That is, they are compelled to become members of the OPSTF on the basis of their sex. The means for this division of membership is OTF By-Law 1, the relevant portions of which provide:

2(a) Women teachers teaching all or a major portion of their assignments in an elementary public school or classes shall be members of FWTAO. . . .

(c) Men teachers teaching all or a portion of their assignments in an elementary school or classes shall be members of OPSTF.

*It must be emphasized that it is not the affiliate system nor OTF's structure that, as such, is under attack in these complaints. Nor do the Complainants, the Commission or OPSTF challenge the right of FWTAO to exist as a female-only association. Rather, the complaints are directed against compelled statutory membership on the basis of sex.*

To understand the nature of that compulsion and the discrimination claimed, I felt it important to describe the structure and goals of OTF; the effect of legislation and more particularly the *Teaching Profession Act*, R.S.O. 1990, c. T.2, on it; and the composition of its five constituent organizational members, all of which have been given, in effect, the status of parties in these proceedings. The organizational affiliates are: FWTAO; OPSTF; the Ontario Secondary School Teachers' Federation [OSSTF]; l'Association des enseignantes et des enseignants franco-ontariens [AEFO]; and the Ontario English Catholic Teachers' Association [OECTA]. Only FWTAO and OPSTF have assigned compulsory statutory membership on the basis of sex.

In Part II of this decision, among other matters, I will detail my findings concerning the structure and history of OTF and its constituent organizational members resulting from that further evidence submitted following the *Third Interim*



*Decision.* Here it will suffice to set out the findings that flowed from the evidence as it was seen at the conclusion of the Commission's case in chief.

*The Teaching Profession Act*, R.S.O. 1980, c. 495, as amended, 1989, c. 92, s. 16, first enacted in 1944, continued the OTF as a body corporate. Section 3 of that Act sets out the objects of OTF:

- to promote and advance the cause of education;
- to raise the status of the teaching profession;
- to promote and advance the interests of teachers and to secure conditions that will make possible the best professional service;
- to co-operate with other teachers' organizations throughout the world having the same or like objects; and
- to represent all members of the pension plan established under the *Teachers' Pension Act*, 1989 in the administration of the plan and the management of the pension fund.

That same legislation continued the constituent Affiliates of the OTF, including FWTAO and OPSTF. The OTF is governed by a Board of Governors and an Executive, to both of which members are elected on the basis of *equality as between the five Affiliates*. This is true even though the membership of one organizational Affiliate might be far larger than another Affiliate.

There is real power in the OTF as an organization. For our purposes, two important examples of such power are: (1) establishing a code of ethics for teachers; and (2) setting the compulsory fee schedule for statutory membership in the constituent

Affiliates. (In fact, however, as we shall see, much of the fee-setting power realistically resides in each Affiliate.) The exercise of both powers necessitates approval by the OTF Board of Governors and the Lieutenant-Governor in Council. A breach of the code of ethics by a teacher can result in disciplinary action of her/him following an adjudicatory proceeding before a statutory tribunal.

The reason for noting the power to impose discipline for breach of a code of ethics is to demonstrate that the OTF is an occupational association which has the characteristic of being a self-governing organization. It is a federation with its own identity and responsibilities within whose structure are five identifiable and independent constituent members.

At the time of the *Third Interim Decision*, the annual fees for statutory members of the constituent members of OTF were as follows:

- a statutory member of OSSTF: \$120 plus 1.0 percent of total annual salary
- a statutory member of the OPSTF: \$50 plus 1.5 percent of total annual salary
- a statutory member of FWTAO:
  - (i) working half-time or more: \$475
  - (ii) working less than half-time: \$237.50
- a statutory member of OECTA:
  - (i) working half-time or more: \$505
  - (ii) working less than half-time: \$252.50
- a statutory member of AEFO: 1.5 percent of total annual salary

As noted, the annual dues must be paid to the OTF as a condition of membership in the organization, that is, in partial fulfillment of a teacher's obligation to be a statutory member of the association to which she/he has been assigned. The OTF, in turn, redistributes the amounts paid to its constituent Affiliate members.

On the facts, there can be no doubt that the rights granted under section 6 of the *Human Rights Code* apply as a general matter to statutory members of the OTF and its constituent Affiliate members. Nor, for the reasons stated in the *Third Interim Decision*, about which no evidence to the contrary was introduced in the hearings following that decision, is there any question in my mind that the Complainants are teachers within the meaning of By-Law 1 of the OTF and sections 1(1)(66) and 230 of the *Education Act*. (See, *Third Interim Decision* at D/229.)

At bottom, compelled statutory membership on the basis of sex, according to the Complainants, denied them the right to become statutory members of OPSTF. And, it resulted in requiring them to pay a substantial fee on an ongoing basis to an organization with whose goals they disagreed. In the *Third Interim Decision*, I stated at D/234:

[T]he Complainants . . . have made it clear that their reason for asking to transfer their statutory membership to OPSTF from FWTAO is because they want to be statutory members of a mixed gender union. They want their fees as statutory members allocated by OTF to OPSTF. They were denied statutory membership in OPSTF not because the organization did not want them. Indeed, the opposite is true; both Complainants had and continue to have strong links with OPSTF.

They were denied that statutory membership because OTF By-Law 1 requires that they as women have a statutory affiliation with FWTAO.

In the *Third Interim Decision*, I dealt with evidence presented by those opposing the complaints going to the good faith of the Complainants. They argued that the complaints before me were nothing more than a thinly disguised attempt by one union (OPSTF) to raid another union (FWTAO). There was uncontested evidence that OPSTF had long advocated as an institutional goal amalgamation with FWTAO. Further, there was uncontested evidence that the costs to the Complainants of this litigation insofar as having Counsel independent of Commission Counsel, which clearly must be substantial, were funded by OPSTF. In the *Third Interim Decision*, at D/234, I stated:

At this point in the proceedings, I am not prepared to say that the complaints were initiated in bad faith, and by that I mean with the primary view on the part of the Commission and the Complainants of facilitating a raid on one union by another. This is not to deny that OPSTF obviously would benefit from an order which would allow a statutory member of FWTAO to transfer such membership to OPSTF and with it dues payment and allocation under the existing OTF structure. Nor is it to deny the obvious organizational interest and support the OPSTF has given to the complaints and Complainants, including the provision of counsel in these and other related proceedings.

....



The evidence thus far, including the demeanor of the Complainants, leads me to believe that they initiated these complaints because they held at the time and continue to hold the sincere belief that they are denied equal treatment in their inability to become statutory members of OPSTF solely because of their sex. . . .

As to the matter of the good faith of the Complainants, it was open to those opposing the complaints to present further evidence following the *Third Interim Decision* on this point. In my view, this was not done.

There was a second thrust to what I will call labour relations evidence offered by those opposing the complaints. It was that the Complainants suffered no detriment merely because they were treated differently in the sense of being assigned to FWTAO as statutory members. That is, for example, they had the benefit of *joint bargaining with OPSTF*. At D/231 of the *Third Interim Decision*, I stated:

In this regard, viewing the record as a whole, it is fair to say that both Complainants have not found themselves disadvantaged by their bargaining representative as to the terms and conditions of their employment. In no small measure, the reason goes to the flexibility of Affiliate representation and bargaining processes. The reality in Ontario seems to be that there is joint bargaining by *local branch affiliates of OPSTF and FWTAO*. This often is done through a local Economic Policy Committee, a given number of members of which are elected by each branch affiliate.



...

The net result of the process is that the collective agreements for the OPSTF and FWTAO provide for precisely the same terms and conditions of employment within the meaning of any collective agreement.

It is possible, too, should the branch affiliates within any local region so agree, for amalgamates to be formed which can be permitted to represent the Affiliates. The evidence indicates that thirteen such [amalgamates] existed in the province in 1989. Indeed, as a matter of law, Bill 127 requires combined bargaining as to central issues for Metropolitan Toronto. . . .

In addition, of course, the Complainants had the opportunity, which they exercised, to become *voluntary members of OPSTF*. In this regard, they had all of the rights of statutory members of OPSTF. They could vote, hold office and otherwise participate fully in the activities of the organization *even though they remained statutory members of FWTAO*. Objectively, the only difference was that their statutory fees paid to the OTF continued to be funneled to FWTAO. And, as voluntary members, the end result was that their total dues were in fact marginally *less* than if they had been statutory members of OPSTF. (At the time of the proceedings which resulted in the *Third Interim Decision*, the annual fee for voluntary members of OPSTF was \$25.) The following was quoted in that decision:

(Testimony of Ms. Logan-Smith at D/231)

Q. And you were aware that OPSTF already gave you all the rights and privileges of membership in its organization?

A. Yes.

(Extract of letter from Ms. Logan-Smith to Mrs. M. Wilson, Secretary-Treasurer of OTF, appealing the denial of her request for statutory membership in OPSTF cited at D/231-232.)

As a woman, I find it offensive and distressing that I am assigned to an affiliate because of my sex. OPSTF represents and protects public elementary school teachers without discrimination, and adheres to the philosophical beliefs embodied in the *Canadian Charter of Rights and Freedoms*. I am allowed all of the rights and privileges of OPSTF as a voluntary member. *However, my fees are directed to an affiliate which I feel does not represent my philosophies and beliefs and whose services I do not use.*

It should be pointed out that OPSTF had the power within its own organization to increase the level of voluntary dues, or for that matter even eliminate the category of voluntary members, although I hasten to add for the reasons already given in relation to OTF By-Law 1, OPSTF was *not able to enlarge its base of those included as statutory members to include females*. The fact is, as I found in the *Third Interim*

*Decision*, that this did not happen nor in my view is it likely to occur so long as OPSTF holds to the goal of amalgamation with FWTAO:

Counsel for the Complainants vigorously argued that there were points of material and objective differences resulting from assigned statutory membership in relation to voluntary membership. Perhaps the most important point in this regard was made by Mr. Juriansz who referred to Article 5, section 2(a) of the OPSTF Constitution which provides:

*The rights, privileges and responsibilities of a Voluntary Member shall be the same as those of a Member but the extent of a provision of the following services shall be available to Voluntary Members only by approval of the Executive following consultation with the District: (i) Tenure services; (ii) Financial support in the event of a strike.*

No evidence was offered concerning the extent to which the indicated services have ever been denied.

Yet, the fact remains that the scope and meaning of these limitations as well as others alluded to by Counsel for the Complainants were derived from a reading of underlying documents, such as the Constitution of the OPSTF, submitted collective agreements, and an application of labour jurisprudence as presented by Complainants' Counsel in their closing arguments on the motions to dismiss. *There*

*was no direct personal evidence offered to demonstrate that holding voluntary membership in OPSTF, and the denial of statutory membership in that body, resulted in, or was likely to result in any real, material and objective detriment. . . . (Id., at D/231.)*

## **2. The Kind of Evidence Submitted Following the *Third Interim Decision***

However, this is not to deny the plethora of evidence presented by those opposing the complaints following the *Third Interim Decision* going to (a) the issue as to whether the Complainants were discriminated against within the meaning of the *Human Rights Code* because of the requirement that they have the status of statutory members of FWTAO; (b) the question as to whether labour relations policy demanded that all women teachers be members of FWTAO; and (c) the relationship of labour relations policy to that set out in the *Human Rights Code*. Under another heading in this decision dealing with labour relations issues, I will more fully discuss (b) and (c), *supra*. The matter of discrimination is partly discussed under this head of the decision.

The questions that I then addressed in the *Third Interim Decision* were (a) what, if anything, was the nature of the injury or detriment faced by the Complainants as a result of the compulsion to be statutory members of FWTAO and the resulting denial of the right to become statutory members of OPSTF? (b) Was this difference in treatment discrimination within the meaning of the *Human Rights Code*? (c) To what extent, if any, does the *Charter of Rights and Freedoms* impact on the answers to these questions?

## B. Discrimination and Compulsion: Injury to Dignitary Interests

### 1. The Meaning in Law to be Attributed to *Discrimination* Under the *Human Rights Code*

Discrimination of the kind complained of in these proceedings flows from the element of *compulsion*. That is, the Complainants say that they were discriminated against because they were denied statutory membership in OPSTF on the basis of their gender. This denial resulted from the requirement that they take statutory membership in FWTAO as a matter of compulsion, like all other female public elementary school teachers.

However, before proceeding further, it may be useful to *place the subject of compulsion as used in this case in context*. There are in the law relevant to this case, as I see it, two aspects to compulsion: (1) In this portion of the decision, compulsion is used in a *human rights context*. The question asked is whether there is a prohibited form of discrimination on the basis of gender when Ontario public elementary school teachers are compelled to be members of a professional association depending on whether they are male or female. The question is asked in the *context of the Human Rights Code*. In that regard, bearing in mind that this Board is a statutory tribunal, it is relevant to restate the provisions of §47 of the *Human Rights Code* which relates to the *primacy* of the Code over other Acts or regulations:

§47(1) - This Act binds the Crown and every agency of the Crown.



(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I [of the Code], this Act applies and prevails unless the Act or regulations *specifically provides that it is to apply despite this Act.*

(2) Compulsion is also used in a *labour relations context*. At another point and under a separate head of this decision, I will discuss compulsion as it is used in labour relations to bind minority members of a bargaining unit represented by a bargaining representative to the will of the majority, including the payment of union dues. What is required as a matter of labour law and labour policy in this province will be canvassed and, in that regard, the interface of that law and policy with what I believe to be the facts in this case and the application of those facts to the provisions of the *Human Rights Code*.

At this point in the decision, I only call attention to the two aspects of compulsion and note that I am dealing here solely with that aspect relating to the *Human Rights Code*.

In the *Third Interim Decision*, there was considerable discussion concerning the meaning to be given to *discrimination* as that term is used under the *Human Rights Code*. (See, pages D/235-D/240.) In closing arguments, this matter was taken up again by those opposing the complaints, and especially for purposes of this section of the decision by FWTAO. Substantial emphasis was placed on section 15 jurisprudence emanating from the *Charter of Rights and Freedoms* - just as was done in closing arguments for the *Third Interim Decision*.

*As to the law relating to that necessary for a finding of discrimination under the Human Rights Code, the reasoning and conclusions reached in the Third Interim Decision remain the same in this the Final Decision. In my view, the basic arguments presented by Counsel opposing the complaints, and particularly Counsel for FWTAO, are the same on this aspect of the case as they were when presented for the Third Interim Decision. See, Vol. 3, Argument on Behalf of the Federation of Women Teachers' Association of Ontario at pp. 233-245. At page 16 of that argument, FWTAO stated:*

The Complainants' evidence on the issue of what substantive differences, if any, they experience as teachers as a result of the fact that [OTF] By-Law 1 assigns their statutory membership to FWTAO instead of OPSTF has been thoroughly canvassed in the Motion to Dismiss argued on June 29 and 30, 1989. We do not propose to review that evidence in detail in view of the fact that our submissions were fully transcribed in Volumes 7 and 8 of the transcript of these proceedings. We continue to rely on those submissions of fact and law.

There then followed a summary, as seen by FWTAO, of the evidence of each Complainant. It centred on the personal values held by each Complainant concerning women teachers as a disadvantaged group, and their perceptions of the facts relating to such teachers. In large part, as I look at FWTAO's presentation as a whole, the import of this summary was to demonstrate how, *objectively viewed*, the Complainants' values and perceptions were not true to the prevailing facts concerning the status of women elementary teachers in the public school system of Ontario.

The *Third Interim Decision* was not grounded, as such, on whether, for example, women elementary school teachers in Ontario are a disadvantaged group. Rather, the questions, as I saw them, for purposes of determining whether there had been discrimination and in that regard injury to a dignitary interest were:

- Had the Complainants been treated differently because of their sex in terms of a right to statutory membership in what they wanted to be a mixed-gender association, namely, OPSTF?
- If they had been treated differently, had they suffered an injury to their dignitary interests as a result?

That portion of FWTAO's argument relating to *dignitary interests* at first blush appears to be different from that which was argued by FWTAO in the *Third Interim Decision* in that there now is "acceptance" of dignitary interests as a legitimate interest for protection under the *Human Rights Code, id.*, at ¶716, p. 239. However, the reality of that acceptance is adherence to a so-called *objective standard* earlier urged by Counsel for FWTAO. In large part, this was dealt with in the *Third Interim Decision*, portions of which will be set out.

In its argument in this matter, FWTAO stated at ¶719, p. 240: "It is our further submission that where dignitary interests have been recognized, the test that has been applied to a determination of whether they have been violated in law is an objective test." In support of this proposition, FWTAO cited the testimony of Professor Alfred W. Blumrosen of Rutgers University School of Law in the United States, and two Canadian cases: *Ontario Human Rights Commission v. Chrysalis*

*Restaurant Enterprises Inc.* (1987), 42 D.L.R. (4th) 752 (Div. Court), and *Re Rocca Group Ltd. and Muise* (1979), 102 D.L.R. (3d) 529 (P.E.I.C.A.).

Professor Blumrosen was introduced as an expert witness by OPSTF. His testimony was received as expert in the areas of labour law and anti-discrimination law in the United States. (See, Tr. Vol 94, at p. 13,239.) That portion of his testimony cited and relied upon by FWTAO is as follows:

THE CHAIRMAN: . . . [I]n American law, is negatively altering the working conditions of employees an objective matter of proof?

THE WITNESS: Yes, in the sense that the courts talk in terms of how would a reasonable person view what has happened to him or to her. In that sense it isn't only the feelings of the individual, the subject[ive] feelings of the individual; those feelings have to be rooted in. . . .

THE CHAIRMAN: Objectively manifested as well?

THE WITNESS: Well, they have to be rooted in some - not only do they have to be observed in the sense that the person has to have manifested them - perhaps by filing a complaint you manifest them - but they have to be based on activities which could understandably give rise to these feelings and be objective in that sense.

THE CHAIRMAN: In the view of a third person?



THE WITNESS: By some standard as viewed by a third person.

THE CHAIRMAN: So it isn't enough that the subject, the person, feel that she has been discriminated against; a third person must be able to look at it and make a reasonable judgement, objectively, that there has been discrimination?

THE WITNESS: Well, by looking at all the events, that there is reason for the individual to have had these subjective feelings; that this individual is not behaving in an unreasonable way by having these feelings. (Transcript, Vol. 96, hereafter: *Tr. Vol.*, at pp. 13,407-13,408.)

Let me now turn to the cases cited by FWTAO. In *Re Ontario Human Rights Commission and Chrysalis Restaurant Enterprises, supra*, in a 2/1 decision, the Divisional Court affirmed a Board of Inquiry ruling dismissing a complaint under the *Ontario Human Rights Code* in which female servers at a disco bar were required to wear sexually revealing "harem" outfits as a condition of employment. Male employees, performing somewhat different functions, were required to wear outfits which were not sexually revealing. The complaints were brought under then section 4 of the *Human Rights Code*. The Board of Inquiry found that though there were differences in the uniform required to be worn, there was not discrimination within the meaning of the Code.

The Court, in effect, set out its own definition of discrimination, though in the result it sustained the conclusions reached by the Board of Inquiry. The Court cited and approved 14 C.E.D. (Ont. 3d edition), Title 74, s. 11, which defined



discrimination as *differential treatment as a result of which the victim suffers adverse consequences or a serious affront to dignity*. *Id.*, at 755. On the facts, the Board of Inquiry could not find any serious affront to dignity. At the time of the *Third Interim Award*, that certainly was not the situation for the Complainants in this matter.

Next, FWTAO cited *Re Rocca Group Ltd. and Muise, supra*. There the Prince Edward Island Supreme Court considered the validity of a shopping centre lease under that Province's *Human Rights Act*. The complainant, a lessee, had entered a shopping centre lease to operate a men's hair styling establishment only. Sometime after this, the shopping centre leased other premises for a business to conduct women's hair styling only. The first business began to do women's hair styling, and the shopping centre sought its eviction for violation of the lease.

The question before the Court was whether the restriction in the lease based on sex was discrimination within the meaning of the *Human Rights Act* and therefore invalid. The Court sustained the restriction. In effect, as I read the Court's judgment, the matter was seen as *trivial*. Yet, there had been a difference of treatment. One shop was to be permitted to do men's hair styling, and the other shop was to be limited to women's hair styling. But, this difference was not to be raised to the level of discrimination. At no point did the Court reject the proposition that a real wounding or insult to the spirit based on gender would not be deemed discrimination within the meaning of the law. At 102 D.L.R.(3d) at pp. 534, 535, the Court stated:

People may be treated differently without any "wounding or insult

to the spirit" while in other cases a wounding or insult would occur. In one case the results may adversely affect a person while in another case the treatment may be of little consequence to the person or perhaps even be of some advantage to that person. I cannot agree that discrimination was meant to include the mere treating of a person differently. If the latter were to occur, not only would the Court, civil rights commissions and boards of inquiry be overrun with cases claiming discrimination but many *inconsequential practices* that have become accepted in our way of life would come into direct conflict with human rights legislation. [Italics added.]

....

In my opinion, to hold in instances such as these that there is discrimination brings into disrepute human rights legislation and seriously impairs the public's confidence in the legislation. Commissions and boards of inquiry which entertain charges of discrimination must be ever alert that merely because people have been treated differently does not necessarily mean that there has been discrimination. However, if there is a finding that someone has been treated differently, the next step is to see if the person who has complained has suffered any adverse consequence *or has had some affront to his or her dignity before finding that there has been discrimination.* The affront to one's dignity must, of course, not be an imagined one but must be one which a reasonable person, standing in the place of the person complaining, would state had lowered his or

her dignity. [Italics added.]

Returning to the testimony of Professor Blumrosen, in effect he said that *in the United States* for there to be discrimination cognizable in law, the following elements must be present: (1) A third person looking at the claim must be able to see that the complainant really feels discriminated against. This factor may be provable by simply filing the complaint. (2) *Looking at all the facts, there is reason for the complainant to have these feelings.*

In the result, I do not believe that the cases cited by FWTAO where American decisions were noted and discussed varied in any significant way from the criteria for a finding of discrimination set out by Professor Blumrosen. As in the arguments incident to the *Third Interim Decision*, FWTAO and, for that matter, all those opposed to the complaints, seem to have taken the position that the second prong of the test for discrimination requires a finding of actual *economic loss*.

In the *Third Interim Decision*, I found that there was very real evidence to satisfy the first point suggested by Professor Blumrosen: The Complainants subjectively manifested their feelings of discrimination on the basis of gender in filing the complaints which are the subject of this extended litigation, and all that was done by them relative to filing such complaints.

As to the second point raised by Professor Blumrosen, at the time of the *Third Interim Decision*, having viewed all the relevant facts, a reasonable person could conclude that there was a rational basis for finding that there was discrimination against the Complainants on the basis of gender which offended their dignitary

interests: They were denied the right to become statutory members of OPSTF, which wanted to be a mixed-gender association, because they were *compelled to be statutory members of a single-gender teaching association, FWTAO*. On the face of it, as to an important segment of their professional working lives, they were *compelled to be statutory members of an association because of their gender*. And, *as such, a large portion of their statutory dues went to fund activities with which they disagreed*.

These findings, in my view, were enough to demonstrate a real injury to the Complainants' dignitary interests. Whether, however, as a result of other evidence and legal arguments, that finding of injury to dignitary interests would remain was another matter.

## **2. Expert Evidence on the Question of Compulsion**

So it was that in the final phase of this proceeding that Counsel for the Commission, the Complainants, and FWTAO brought forward expert testimony, reflecting the areas of psychology, sociology, history, socio-linguistics and law as to their perception of the nature of injury to dignitary interests.

- **Dr. Cynthia Fuchs Epstein** - For the Commission, in my view, the primary witness under this head of the case was Dr. Cynthia Fuchs Epstein, Distinguished Professor of Sociology at the Graduate Centre, City University of New York. Following lengthy testimony and examination as to her specific areas of expertise applicable to this litigation by Counsel for FWTAO and OTF, Professor Epstein was accepted as an expert in three areas: the sociology of knowledge, and gender and workplace issues.



(Tr. Vol. 107, at 14778-14779.) In that regard, I took notice of the fact that sociology is a science which can be applied in a cross-cultural manner. However, I made it clear that whether Professor Epstein had the necessary factual foundation to make that application in Canada and *more particularly to the facts of this case is, of course, a different question. (Ibid.)*

In my view, considering as a whole her testimony - which took about seven days and, in that regard, extensive cross-examination - there is little doubt in my mind that what Professor Epstein had to say was indeed meaningful in this matter. Her research often was transnational, and the methods she employed were those of a social scientist applying scientific methods. One aspect of this was that the results were amenable to replication. (See, Tr. Vol. 107, at p. 14, 828, and Tr. Vol. 108, at pp. 14,837-14,841.) She provided conceptual validation as to the Complainants' sense of discrimination and hurt. In sociological terms, what the Complainants suffered through compulsory membership based on gender was *symbolic segregation*.

At Tr. Vol. 113, at pp. 15309-15310, Professor Epstein in direct examination testified as to the effect of *voluntary membership as contrasted to statutory membership of the Complainants or, for that matter, other women associates of OPSTF*:

Well, I think that when you have different designations for membership . . . that also creates invidious comparison. That is to say if people who are members in an organization do not have the same kind of membership then there is a differentiation which results in a different evaluation.



So I think that the fact that there are designations of voluntary and statutory membership creates an invidious comparison.

THE CHAIRMAN: Would your answer remain the same assuming that for all substantive purposes a voluntary member had all the rights and privileges as a statutory member or, if you will, a regular member?

THE WITNESS: Well, I think the designation of the different title for voluntary members is one of those qualities I would call symbolic segregation. That is, if they were in fact exactly the same, then why not have the same characterization? The mere fact that there is a different designation which I understand is not just purely symbolic, but also represents a lesser contribution in terms of dues, . . . carries with it connotations that imply differential membership.

At another point in direct examination by Counsel for OPSTF, Professor Epstein was asked to comment on what effect there would be if a female voluntary member had been elected president of that organization. At Tr. Vol 113, at pp. 15330-15331, she answered:

Of course that would contribute to the knowledge and expectations [of the members], but nevertheless there would also be other knowledge which is, let us say, a distinctive designation, and it does in fact have a differentiated position. It has a different designation which implies some difference in position, social position. So, it might not be across-

the-board, but it certainly would alert members of that social group that there is some distinction being made.

Professor Epstein enlarged upon her views concerning symbolic segregation and so-called invidious comparisons which she said could arise from compulsory Affiliate membership on the basis of gender. The sense I had was that, at a minimum, such symbolic segregation was a kind of incipient actual segregation. Professor Epstein testified:

I think [that] compulsory membership is a very strong mechanism for creating segregation and therefore contributing to invidious distinctions, and so it is on the continuum of mechanisms from informal ones as I said before. . . . It creates a rule toward the polar extreme of insistence and mandate for segregation.

....

Q. Do you have any views on stereotypes with respect to compulsory membership?

A. Well, I think that compulsory membership underscores the view that men and women have distinct and separate and perhaps mutually exclusive needs and interests and therefore it contributes to a general ethos that legitimates the notion that men and women are distinctly different with different capacities and interests and so on.

So, I think it is a powerful mechanism for adding to the already established theme in society that the sexes are distinctly different and therefore might be appropriately placed on different tracks and appropriately placed in different life situations.

Q. What are the consequences of that perception in your view?

A. In my view, as I mentioned before, it leads to invidious comparison and typically, as we have known in the past, this has disproportionately affected women negatively. They had limitations on their opportunity as a result of this general social attitude that they have less capacity than men and they have a different orientation toward the [world] that focuses them less in the public sphere and more in the private sphere and that in terms of their intellect and emotional capacities they essentially are different. (Tr. Vol. 113, at pp. 15,304-15,306.)

(It is appropriate here to note that the experience of the many expert witnesses who appeared before this Board was of high quality. Generally, I will not review their credentials except where I believe her/his background is particularly relevant to an analysis of that being discussed.)

As was true with most of the expert witnesses, so it was with Professor Epstein. Except for material supplied by Counsel relative to certain portions of evidence thus far compiled at the hearing, there was no direct, in-depth knowledge of the history of teaching in Ontario or the background and dynamics of the operations of OTF and its affiliate members. (Exceptions in this regard were Dr. Dorothy E. Smith and Dr.

Marguerite A. Cassin, whose testimony is set out, *infra*.)

Rather, several of Professor Epstein's studies theoretically were relevant to the issue of injury to dignitary interests. I refer especially to Professor Epstein's work relating to symbolic segregation and her analysis and critique of research methods in the study of gender questions. Important, though certainly not the only relevant document among her work is her book, *Deceptive Distinctions: Sex, Gender, and the Social Order*, Yale University Press and the Russell Sage Foundation, 1988, received as Exhibit 882. In this regard, I note her testimony, quoted above, where she labelled as *symbolic segregation* the compulsory element of statutory membership in FWTAO and OPSTF on the basis of gender.

Chapter 10 of *Deceptive Distinctions*, pp. 215-231, is titled *Symbolic Segregation: Gender Differences in Everyday Behavior, Communication, and Social Customs*. The opening to that chapter is as follows:

Symbolic segregation of the sexes is necessary to maintain gender distinctions because physical separation can do only part of the job of differentiation. Men and women always have some contact with each other, so ways must be found to specify that they are different even when they engage in similar activities and exhibit the same behavior in the same social space. One such device is the different terminology used to describe what men and women do when they do the same thing. Thus men are chefs and women, cooks. Men who work the land are called farmers, but women who do so are usually defined as farmers' wives. . . . English is a relatively sex-free language



grammatically, unlike German or French, for example, but male writers of poetry are called poets while women have been called poetesses; and the same has been so for sculptors (sculptresses), waiters (waitresses), and stewards (stewardesses). These differences have typically incorporated invidious distinctions, while the female version of the noun connot[es] a lesser commitment or proficiency. (*Id.*, at p. 215.)

In effect, to Professor Epstein, as a sociologist who has given much of her career to a study of gender issues, the different labelling of people on the basis of their gender can be seen as segregation, an effect of which encourages their different treatment. To Professor Epstein, statutory membership in FWTAO and OPSTF can be seen as symbolic segregation that causes invidious comparison - even in situations where there otherwise appears to be no substantive difference in the memberships, as such.

But, having said this, I do not think Professor Epstein's evidence concerning compulsory membership is determinative of the issue of injury to dignitary interests. In the final analysis, in my view, that judgment must derive from the facts of this case. Yet, the testimony of Professor Epstein, as I suggested earlier, has helped to set a context that permits greater understanding of the reality of this case. It gives fuller meaning to injury to dignitary interests as applied to gender.

FWTAO called eleven expert witnesses. All of them were asked to comment on, among other subjects, that which was central to this case: the matter of *compulsion in terms of the assignment of Affiliate membership*. For reasons that will become clear in a review of the testimony that follows, I cannot accept the evidence of those



experts as negating the demonstration of harm to the Complainants' dignitary interests.

Now, I will proceed with a description and analysis of each of the expert witnesses called by FWTAO relating to the element of compulsion under the *Human Rights Code*. In doing this, however, I will indicate, sometimes in substantial detail, the overall nature of the expert testimony. I will do this partly because that overall view may impact on the specific question of compulsion. And, I will do this partly for reasons of efficiency in dealing with an extremely lengthy record and a correspondingly lengthy decision.

• **Dr. Hilary Margaret Lips** - A Professor of Psychology at Radford University, Radford, Virginia, she was qualified as an expert in the areas of social psychology and the social aspects of gender. Professor Lips spoke of persons who seek to escape a group identity as seen through the eyes of social psychology. At Tr. Vol. 52, at pp. 7141-7143, she stated:

. . . Social psychologists have a theory called "social identity" theory that I think is applicable to this situation. An identity source is who we think we are. Our self-concept is our identity, and a social identity is the aspect of who we think we are that is determined by our identification and association with groups, social groups, groups that we are a part of. So my social identity would be made of the fact that I'm a woman. I'm a Canadian, and I'm a social psychologist. All those are groups to which I belong.

The basic assumption of this theory is that everyone strives for a positive social identity because we all want to feel positive about our social identity, that aspect of our self-concept that is formed from our group identification. And sometimes the groups to which we belong we feel are negatively valued and we feel that associating with those groups is bad for our social identity. In other words, it lowers or decreases the positive values of our social identity. If that happens, a person may seek membership in a more positively valued group. That is, they may try to disassociate with one group and associate themselves with another group whom they feel is valued more positively by society at large.

Q. And what is the effect or the consequence of doing that?

A. . . . [W]hat people are doing really is escaping their original group or their sense of identification with that group. Sometimes that helps them to feel better about themselves. It's not necessarily good for the group that they escape from.

As I review Professor Lips' testimony on this aspect of the case, it relates at least in part as to why a person might want to leave an organization. I understand Professor Lips to say that the choice to leave might relate to escaping that from which there can be no ready escape. Professor Lips put it this way:

. . . If you change your identification, you can feel better, perhaps. . . .  
But you can't change the value of women. . . . You are still a woman

and it's not one of those things you can escape. So the only way a group can change its social identity, the social identity of its members, is to work collectively to improve the value which society places on itself.

In effect, it would be, according to Professor Lips, counter-productive for a woman to exercise individual choice and leave a women's organization. Her best chance to improve her social identity, as I understand Professor Lips, is to work through the collective and more particularly through a single organization where, in her words, there might be "more clout."

When asked in cross-examination how she could justify this approach in the context of the organizations of which she is a member, Professor Lips answered that the historical roots of FWTAO were unique and, as such, justified such treatment.

At a later point in cross-examination by Commission Counsel, there was this exchange. This followed recognition that unlike a "normal union" situation where, from time to time, there is a right in the membership to decertify the union, those who are statutory members of the various federations have no such choice:

Q. I would ask you what your views would be if you were forced to belong to an organization which purported to advance the position of yourself and women and you came to have some fundamental disagreement with either its strategy or its particular goals and you decided, after some experience, that you have no practical opportunity to change the views of that organization. You were a dissenter. Would you have any concerns about being forced to be a member, including

[being] forced to give financial support to that association?

A. I suppose I would.

Q. How far would that go? Would you think that someone else's view of what is better for you should override? Or, do you think that you should have the opportunity to choose or at least to join another association?

A. I'm not sure. I'm not sure what I would do. I am sure that I would be uncomfortable. (Tr. Vol. 53, at pp. 7204-7205.)

• **Professor William W. Black** - At the time of his testimony, Mr. Black was a Visiting Professor and Director of the Human Rights Research and Education Centre of the University of Ottawa. He held the rank of Associate Professor, University of British Columbia where he had been a member of faculty since 1975. Professor Black was accepted as an expert in the areas of human rights theory and practice, equality theory and systemic discrimination. In giving his testimony, it should be borne in mind that Professor Black testified in the context of his experience with the law. It remained to be seen whether and to what extent that testimony was but an extension of that which should otherwise be treated in these proceedings as legal argument. (Tr. Vol. 72, at pp. 9550-9553.) Further, it must be emphasized that Professor Black's testimony was not bottomed on the application of findings derived from the application of scientific methods, such as might be used by sociologists or psychologists.



Professor Black held the view that "equality theory" in law had developed to the point in the past twenty years where the interests of the disadvantaged group would stand over those of individuals within the group. In his Notice of Evidence, Ex. No. 622, Professor Black stated in ¶8:

Because human rights codes see individual rights in the context of group characteristics and rights, resolving these apparent conflicts depends on balancing these interests in light of the purposes of these codes, namely, the removal of discrimination and the promotion of human dignity. In my view, the premise linking these two purposes is that, in the long run, human dignity is best promoted by the removal of discrimination. As discrimination is a systemic problem, it must be removed at the level of the system or the group before individual members of the group can be assured of a lasting benefit. Where, then, a beneficiary (or intended beneficiary) of an affirmative action measure complains that in and of itself it amounts to discrimination against him or her on the grounds of the shared group characteristic underlying the program, the effect of the program on the group as a whole is a most material factor. If the net effect on the group is a positive one, it would not in my view amount to discrimination (under a statute) (on that ground) against an individual.

In direct examination, he was asked by Counsel for FWTAO: ". . . Did you have any particular statutory framework in mind here (in reference to ¶8, *supra*,) or is this just a general statement?" Professor Black answered:



I think it arises out of equality theory generally. But, I certainly think it is reflected generally in the statutes, particularly the statutory provisions across the country that allow for what is sometimes called affirmative action, sometimes special programs and so on. (Tr. Vol. 72, at p. 9582.)

There is no question that human rights codes provide for affirmative action and special programs designed to relieve against designated kinds of discrimination. To me, however, it is far from clear (1) as to whether an affirmative action or special program will qualify as such if it discriminates against the very people it is designed to help, and (2), more importantly, whether an affirmative action or special program is to be treated as the statutory goal, that is, collective vindication of human rights as *the way to achieve individual rights*. As to this latter point, partly for reasons which will be discussed under the head of onus or burden of proof in this segment of the decision, I cannot accept Professor Black's view.

• **Dr. Michael S. Kimmel** - An Assistant Professor at the State University of New York at Stony Brook, Dr. Kimmel was accepted as an expert in the field of the sociology of gender, masculinity, and gender relations, as well as the sociology of social movements. Professor Kimmel spoke cogently about, among other things, differences between formal and substantive democracy, and the need for women to maintain unity in advocacy groups lest such groups become dominated by men. (See, Tr. Vol. 58, at pp. 7906-7909.)

That portion of Professor Kimmel's testimony noted by the Commission is this brief extract found at Tr. Vol. 59, at p. 8128:

Q. Do you consider it important that people be allowed to define for themselves what their self-identity is and to act in accordance with their self-identity?

A. I think it's important to provide to people the largest range of possibilities for that construction, absolutely.

This answer, however, must be placed in context. Professor Kimmel made it clear throughout his testimony, including cross-examination, that he endorses compulsory membership in for example a women's advocacy organization such as FWTAO. This is because gender is an important component of a woman's life.

. . . [T]he relations between women and men are not equal. . . . Women need advocacy organizations to promote their interests. . . . Those organizations, to promote women's interests, do so not only for the individual women who may be members of them, but for women as a group, both to protect women and to advance their interests. (Tr. Vol. 59, at pp. 8177-8178.)

Compulsory membership increases the power of the organization. It speaks with one voice for the group represented rather than having the voices of that group fragmented. (Tr. Vol. 58, at pp. 7937-7939.) In addition, it denies those who would otherwise be able to opt out a "free ride." And, to Professor Kimmel, a free ride means more than not paying for benefits. It also means receiving benefits redounding to a group as a whole, such as women teachers, without regard to

payment. (Tr. Vol. 59, at pp. 8133-8134.)

There is this added, and not insignificant gloss that must be noted concerning Professor Kimmel's testimony: The injury to the Complainants' dignitary interests is rooted in the fact of discrimination, namely, that they are unable to become statutory members of OPSTF because they are required as a result of their sex to be statutory members of FWTAO. There is no challenge to FWTAO's right to exist and function as a women-only organization. The key element that goes into the fact of discrimination is compulsion.

Professor Kimmel in his Notice of Evidence required of witnesses appearing before this Board of Inquiry did not address the question of compulsion. Further, and this is perhaps more important, Professor Kimmel does not purport to have any expertise concerning the subject. In cross-examination by Commission Counsel, there was the following exchange:

Q. I didn't notice anything in your Notice of Evidence dealing with compulsory membership in a women's organization.

A. I don't think there is.

Q. When did you address that question?

A. I don't know that I did. I'm sorry.

Q. I heard you in your evidence address the question of compulsory

membership. I'm wondering when you began to address that issue intellectually. You didn't deal with it in your Notice of Evidence.

A. When I was informed that the ways in which membership is organized in the OTF is by requiring various people - teachers in Francophone schools, Catholic schools, women elementary teachers, secondary teachers, who are required by statute to be members of the organization that represents those groups. So then I understood what you mean by compulsory membership.

Q. Do I understand that that was after you prepared your original Notice of Evidence?

A. *Yes. I didn't think that I could speak to the point based on my expertise, about the necessity for compulsory membership or not.*

Q. *That's outside your area of expertise?*

A. *Yes. I think so. (Tr. Vol. 59, at pp. 5173-5174.)*

• Dr. Jill Ker Conway -- Dr. Conway was accepted as an expert in 19th and 20th century American history with special emphasis on the history of American women and, in particular, the relationship between education and training on the one hand, and access to professional life and professional achievement on the other. She was also accepted as an expert on university administration with special emphasis on women-only institutions. (Tr. Vol. 60 at p. 8236.)

Dr. Conway's Notice of Evidence was directed toward the areas in which she was accepted as an expert. Nothing was included in that Notice of Evidence concerning *compulsory membership in a professional association on the basis of gender*. Rather, by far the greater part of her direct examination related to her study of, experience with and opinions about single-sex institutions, both educational and professional. In this regard, it is fair to say that Dr. Conway strongly believed that the historical evidence favoured the operation of single-sex educational institutions as a way to give female students the greatest possible opportunity, stimulation and support.

I see no need to pursue this matter. The operation of FWTAO as a single-sex association is not called into dispute in these complaints. I make this point with emphasis at another section in this part of the decision. Nor do I see the issue as one as to whether FWTAO might in some way be "weakened" if its members were allowed choice between the two elementary school Affiliates, though that question will be more fully canvassed in the following two segments of this decision.

Toward the end of FWTAO Counsel's questioning of Dr. Conway, the following questions and answers were given in regard to compulsory membership:

Q. Now, could you comment on the phenomenon of compulsory membership in a women's organization in this context and, particularly with reference to this, the virtues which you have described as being associated with women's institutions. In your view, would they survive or translate into a situation like the OTF compulsory membership situation?



A. Well, I think that there is no question that the experience of professional training and development in a same-sex group operates whether the membership is voluntary or compulsory. I guess the thing that really strikes me about the pattern that exists in Ontario under the structure of the OTF is that it seems to me a wonderful inheritance of Canadian history where there is such precise attention to the interests of a variety of groups, all very carefully balanced off.

If you live in the majoritarian democracy to the South, it looks very attractive, this very careful effort to balance off different groups and try to somehow foster their respective interests under one umbrella organization. And, of course, I am not troubled by compulsory membership in a union. I was born in Australia and grew up living and working in a society where union membership is compulsory for everyone. So, it doesn't trouble me.

Q. Let me ask you another question to explore this issue of voluntariness. Given your association with some women's voluntary organizations or institutions and your scholarship about many others, can you give us any idea about whether the culture, as a whole, encourages or discourages women's affiliation with women-only organizations, if left to a voluntary approach?

A. Well, it's very interesting. You see, I think wherever issues of power and achievement are not at issue, society encourages it all the time in a

segregated work force for low-paying and low-skill occupations, and society seems to do that systematically over time with very little deviation. But, when the question of women associating together raises issues of power and control over resources, society discourages it very actively.

Q. And, in that context of society discouraging women's voluntary attachment to a women-only organization, do you see any particular role to be played by compulsory membership?

A. Well, I can see that in a situation where there is a contrasting set of economic opportunities within the teaching profession in this Province, quite clearly having a power base and set of resources to advocate women's needs, would be beneficial. (Tr. Vol. 60. at pp. 8336-8338.)

In cross-examination, the question of compulsory membership in FWTAO was put to Dr. Conway by Commission Counsel. The following constitutes that exchange:

Q. I didn't notice any indication in your Notice of Evidence of your dealing with the issue of compulsory membership. Is that correct?

A. That is correct.

Q. Can you tell me when you first addressed that issue as it relates to this particular hearing?

A. I was aware when I was asked if I would be willing to serve as an expert witness that membership in the Ontario Teachers' Federation was compulsory and the membership of the various Affiliates was divided up by, as I understand it, some By-Laws of the Federation. As I explained yesterday, having grown up in Australia, I feel that compulsory union membership in the teachers' federation is not an issue here where the people divide up by gender.

Q. On a compulsory basis?

A. I have indicated that I think the issue here is whether or not a group whose purpose is to maximize the career potential of women teachers in the elementary system can maintain its base of resources is a very serious one for its future. I take the question of compulsory membership as a very important one on which I believe there are some arguments that can be made.

Q. You see this as relating to the continuation of the institution?

A. I think it can probably continue with very limited resources, but I don't believe that that is a particularly beneficial thing for women teachers.

Q. With respect, Professor Conway, you don't know how many women would choose to belong to a mixed [gender] organization or a single-sex organization given the choice?

A. I do know how strong the cultural pressure is for women to affiliate with men's organizations and strong pressure that is exerted, which I have experienced for ten years running a single-sex institution, and historically that has been very effective.

Q. You have no idea in this particular case?

A. No. I can only tell you by analogy with past history that that has nearly universally occurred. (Tr. Vol. 61, at pp. 8372-8374.)

For the following reasons, I give limited weight to the expert testimony provided by Dr. Conway on the matter of compulsory membership in FWTAO:

- Her comments concerning compulsory membership were not central to the primary thrust of her testimony concerning single-sex educational institutions and associations. This was not a subject covered in her Notice of Evidence.
- Indeed, the bases for her comments appeared to be grounded in her experience in Australia and with the union movement there.
- Where Dr. Conway in her direct examination relied upon the history of OTF and its Affiliates, it was done, and I say this with the greatest respect, on misconceived grounds. Dr. Conway saw the development of OTF and its Affiliates, including FWTAO, as part of some *precise balancing of varied interests reflecting a unique aspect of Canadian history*. As Part II of this

decision suggests, the facts simply do not support that view. Neither OTF nor its Affiliates can be seen as the precursors of affirmative action programs for disadvantaged groups of Ontario primary and secondary teachers. The facts and reasons incident to these conclusions, as I said, are more fully set out in the next segment of this decision.

- Dr. Conway's comments were directed toward that which, in her view, *may be needed to continue the organization. No significant analysis appeared relating to the effect of compulsion on individuals subject to such power. And, that is a matter of prime concern, as I see it, in these proceedings.*

- In the final analysis, whether FWTAO would be substantially impeded as an organization if its members have choice in terms of statutory affiliation can better be determined by *facts which are more directly related to FWTAO.* I refer to and will deal in far more detail under the head of labour relations in this decision with the testimony of Kay Sigurjonsson, Deputy Executive Director of FWTAO for the past twelve years, and before that a staff member holding various positions since her arrival as a full-time employee in 1963. It will suffice at this point to note that Ms. Sigurjonsson had some rather specific thoughts based on her experience as to what might happen to FWTAO membership if the element of compulsion on the basis of gender were removed. (See, Tr. Vols. 43-48.)

- **Dr. Katherine Kish Sklar** - Dr. Sklar is a Distinguished Professor at the State University of New York at Binghamton. She was qualified as an expert in American



women's history with particular reference to separate women's institutions. (Tr. Vol. 54, at p. 7313.) In that regard, I note that Professor Sklar furthered narrowed her present scholarship to the period 1830 to 1930, though she had also written about earlier times.

In her direct evidence, Professor Sklar was unhesitant in affirming the need for women-only institutions to deal with the concerns of women. In this regard, she spoke about the evolution or, one might say considering Professor Sklar's view, the devolution of the National American Women's Suffrage Association.

It began, as its name suggests, as an organization concerned with a vital issue for women (and, one should add, to the rest of society) namely, the right to vote and hold public office. It was an organization of women. After the right to vote was afforded by constitutional amendment, Professor Sklar said the association turned itself into the League of Women Voters. As such, it did pursue specific issues such as the regulation of child labour. Later, however, the League became an organization, in Professor Sklar's view, for the vetting of issues by a male-dominated political base. (Tr. Vol. 54, at pp. 7384-7390.)

The lesson to be derived from this, according to Professor Sklar, is the need for a women-only association to adhere to women's issues if it is to continue to be effective. (See her discussion of the American Association of University Women, Tr. Vol. 54, at pp. 7395-7396.)

From her examination of American institutions, Professor Sklar generalized in her Notice of Evidence at ¶13, repeated at Tr. Vol. 54, at pp. 7400-7401:.

In my view, all-women institutions are just as integral to the advancement of women at the present time as they were in the past. In both the past and the present, women's formal advancement toward equality has often been mistaken for the achievement of real social equality. Based on the historical record, women's ability to continue to work toward achieving real social equality would be diminished if all-women institutions were dismantled.

Necessary to effectuating an agenda for women emanating from an all-women's organization, said Professor Sklar, is access to and control of resources and funds to achieve identified goals. (Tr. Vol. 54, at pp. 7404-7410.) In that regard, Professor Sklar offered examples drawn from the participation of women in the American anti-slavery movement and in the Methodist Church.

Nothing was said in either Professor Sklar's Notice of Evidence or her testimony concerning any element of *membership* *compulsion*, other than that which "comes from one's culture, but not from the State." Moreover, Professor Sklar made it clear there is "no equivalent to the FW[TAO] as an organization." (Tr. Vol. 55, at p. 7702.)

Yet, in cross-examination, Professor Sklar gave her full approval to compulsory membership in FWTAO. She was asked repeatedly to explain her rationale and, in that regard, to state whether she was speaking as an expert in the context of her qualifications at this hearing. Further she was asked to indicate the time she had given to a review of materials supplied by FWTAO concerning it, OTF, and statutory membership.

In my view, the following testimony is illustrative of what Professor Sklar said concerning compulsory membership in FWTAO:

A. . . . In so many of our social institutions, women's interests are not given priority unless women themselves defend it. And, if in a situation where other groups have more power and that power is articulated in a formal way by compulsory membership, and there is one group that lacks that dimension of formal power, surely the ability of that group to represent the interests of its constituency will diminish. That a voluntary group will be seen as much less powerful or much less meaningful, much less significant in what they are advocating in a context in which every other group in the debate has this other I would say much higher degree of power to speak for their group.

THE CHAIR: Are you saying that with the understanding that in any event a teacher, a female [public] elementary school teacher will still have the obligation to be a member of either a mixed-gender unit or FW[TAO]? In that sense there is no choice.

...

THE WITNESS: What I would expect in that case is a situation where women who identify with mixed groups and with male activity would move their membership and weaken the women's membership. The distinctions that we see in our society between men and women

in which men have authority and women lack authority would be reflected very strongly in the choice that a teacher would be making. And a . . . woman teacher would then be making a decision: Do I want to go with a group that lacks authority? Or, do I want to go with a group that . . . has authority because it has men in it? I would imagine there would be a significant number who would, based on their socialization, based on their understanding of history and how power works in society who would identify with that male group and therefore weaken I would say a very important historical entity in its ability to articulate the interests of women.

. . . [H]istorians are not in the business of prediction, but we are 20th century people, and women often do not see a group of women as an agency that they want to affiliate with. In the 19th century there would be much less of a problem about that. So I think as far as public policy goes retaining the historical continuity of this group [FWTAO] would serve . . . the larger purposes of the Ontario Teachers' Federation in trying to create greater substantive equality. (Tr. Vol. 55, at pp. 7708-7711)

Yet, the bases for Professor Sklar's conclusions, in my view, are open to considerable question. She was asked whether her assessment as to the potential *substantial* loss of FWTAO membership was based on any information given to her by FWTAO, or otherwise presented in this record. Her answer was: "No. I have never heard anything about that." (Tr. Vol. 55, at p. 7726.) She was asked whether there was any parallel to any American organization in terms of compulsory membership. Her

answer again was *No.* (Tr. Vol. 55, at p. 7731; see also, pp. 7755-7756.) There was this further testimony from Professor Sklar as to the conclusions she reached concerning compulsion:

Q. . . . [Dr. Baum] asked you whether your testimony based on the recommendation of continued compulsory membership in FW[TAO] was based on your historical expertise or your personal opinion.

A. My answer was it was based on my historical expertise.

Q. You haven't told us about any organization in history that was compulsory.

A. I also haven't told you about any society where men and women are equal. I mean we don't always have to have in front of us the complete story of what we are talking about if what we are learning from history is patterns in the past that can be - have a certain predictive power.

Q. The question is you have not identified for us in the historical record an organization that had compulsory membership and then lost that compulsory membership and became weaker, have you?

A. No. (Tr. Vol. 55, at pp. 7745-7746.)

The material that Professor Sklar reviewed relative to this hearing and incident to her testimony was the testimony of Dr. Florence Henderson and that of three other



witnesses. It is fair to say that this review did not involve considerable time:

Q. When did you review these materials?

A. I don't know. Two weeks ago?

Q. How long did you spend reviewing them?

A. A short time.

Q. Can you give us an estimate of the time?

A. An hour.

Q. An hour. How much time did you spend visiting . . . elementary schools in Ontario?

A. None. (Tr. Vol. 55, at pp. 7738-7739.)

There is no doubt that Professor Sklar is an expert for that claimed by FWTAO and agreed to by those supporting the Complaints. For the reasons stated, there is considerable doubt as to whether Professor Sklar's expertise can be transferred to the question of compulsory membership. There was no analogue in American history from which Professor Sklar could draw upon for her conclusions. There was limited review of the facts relative to this proceeding that would give her a base upon which she could then generalize. And, as Part II of this decision will show, it is far

from clear whether FWTAO would lose any substantial numbers if its members were given a choice between elementary school affiliates.

- **Dr. Joy Parr** - Dr. Parr is a Professor at Queen's University, Kingston, Ontario. Her primary appointment is in the History Department where her teaching is largely in the Honours program and in the Doctoral program. She also teaches in the School of Industrial Relations and in the Women's Studies Program. (Tr. Vol. 56, at pp. 7768-7769.) Professor Parr was accepted as an expert in Canadian economics and labour history from 1870 to 1950 with special emphasis on gendered relations. Professor Parr said the term *gendered relations* was a way to treat with both men and women as gendered subjects. (Tr. Vol. 56, at p. 7776.) It should be noted that Professor Parr's post-graduate educational background is both in history and economics.

A significant portion of Professor Parr's testimony reinforced a point about which there is no disagreement in these proceedings: Women in Canada have been and currently remain a disadvantaged group with regard to social equality, socio-economic status and achievement, and employment opportunity. (Tr. Vol. 56, at p. 7777.) Professor Parr then stated, quoting from ¶4 of her Notice of Evidence, Exhibit No. 557, set out in Transcript at Tr. Vol. 56, at pp. 7777-7778:

In Canada, as in other western industrial states, there is a division of labour by sex in which women occupy subordinate social and/or economic status in comparison to men. Since the Industrial Revolution, women in western societies have rarely enjoyed economic remuneration and benefits, employment mobility and opportunity or

promotional advancement equal to that enjoyed by men.

That which led Professor Parr to her conclusions included a study of general statistics. But, I believe it is also fair to say that her academic bent was an examination of individual situations, such as knitting communities in England. (See, Tr. Vol. 56, at pp. 7786-7795.)

She spoke of the difference between what might be called the egalitarianism of formal unionism and its reality at the early part of the 20th century in these knitting communities. Women were members of the union. They had the right to vote. In that sense, there was formal equality. However, they tended not to attend meetings because they were held at night, and women had their second job - family care. Moreover, the meetings were held at union halls in locations not particularly hospitable to women. The power that was exercised by the men resulted in segregated work assignments for women, and lesser benefits. (Tr. Vol. 56, at pp. 7812-7816.) Professor Parr conducted similar studies in Ontario. (See, Tr. Vol. 56, at pp. 7816-7824.)

What Professor Parr has said up to this point can be accepted. The critical question, however, is: To what extent can those generalized findings be transferred and applied to justify compulsory membership on the basis of gender to an organization such as FWTAO? The closest Professor Parr comes to making that transfer is in ¶12 of her Notice of Evidence. There she declares that "As a historian, I believe women have made measurable gains during this century that have reduced inequality of opportunity, remuneration and occupational achievement. . . ." (Tr. Vol. 56, at 7830-7831.) Professor Parr then in direct examination indicated some of the limits,

such as the "glass ceiling," or, translated into teacher terms, *positions of added responsibilities*.

Professor Parr then concludes ¶12 with this statement: "Finally, I believe that there is historical evidence which demonstrates that women are better able to fight for substantive equality through women-only organizations because in such organizations women have a stronger collective identity and are more effective in organizing to meet their distinctive needs." (Quoted at Tr. Vol. 56, at p. 7834.)

This statement does bear upon the issues before me. However, Professor Parr left no doubt that the statement was *not based on her research*. Rather, it was based on the research of other historians who were not before me. Moreover, in direct examination, aside from the conclusionary statement, there was no evidence presented by Professor Parr as to the nature and quality of the research by the other historians on whom she relied. I simply am in no position to give any meaningful weight to ¶12 of Professor Parr's Notice of Evidence. (Tr. Vol. 56, at p. 7834.)

- **Dr. Dale Spender** - Dr. Spender, a researcher, writer, former secondary school teacher and lecturer, received her doctorate on the subject of language and sex from the University of London. She took her doctorate there, she said, after fourteen Australian universities (Australia being her native country) stated that the subject was "not considered a topic." (Tr. Vol. 24, at p. 2831.) This is how Dr. Spender described her expertise:

Q. Now within the general area of language and the intellectual



history, what would you identify as your primary area of expertise?

A. To put it very simply, I would say *conversational codes, the different codes of the sexes, in terms of both the spoken and the printed word, and the ways of communication*. But that's the easiest way. It's a difficult analysis for something like that, the conversational code. (Tr. Vol. 24, at pp. 2842-2843.)

Without objection, Counsel for FWTAO enlarged the stated area of expertise:

MS. EBERTS: The general description is for that. Within the general area of expertise of language and intellectual history there is, as well, a specific area of expertise in conversation codes.

And, I would ask that the witness be accepted as an expert in the general and specific areas that she has identified that are reflected in her curriculum vitae [Exhibit 200]. (Tr. Vol. 24, at p. 2842.)

Included among the research of Dr. Spender are analyses of mixed-sex conversations and, in that regard, probes for built-in gender biases. Often the research is based on taped conversations where the participants, at least initially, are not aware that they are being recorded. The object, according to Dr. Spender, is to focus the research on natural, or real situations. This approach to research, that is, the methodology, Dr. Spender called *ethnography*. (Tr. Vol. 24, at pp. 2873-2874.) It is, she said, an approach that tries to account for variables. (Tr. Vol. 24, at p. 2873.) Dr. Spender continued:



So that what you would do in an ethnographic study is instead of trying to set something up and control everything, you would actually go into a natural setting and what you would do is you would try to map some of the things that are happening. (Tr. Vol. 24, at p. 2874).

But, the question is asked: How is such research validated? To what extent can the findings be tested and replicated? This was Dr. Spender's response:

But it's also the case about what you want to use your research for. And while there are certain contexts in which I would want to use my research for academic respectability, like getting a Ph.D., or like writing academic papers, there are also contexts in which as an educator, my research is for other educators and for teachers.

So, for example, I would be perfectly content with saying to teachers, "This is what happens in lots of other classrooms. Does it happen in yours?" And leaving it to them to test it out for themselves.

The whole mark of my research in lots of ways is that I do not say, "I'm the expert. You must listen to what I tell you." I've actually said with almost every piece of research that I've done, "I would like you to test this out for yourself."

So, it's the very reverse of the sorts of research that have experts - that you must send an expert off to do something. . . . [Y]ou make a tape of mixed-sex conversations. You make a tape in your classroom. You do

some sort of test to see if you're evaluating male students as having more potential than female students. (Tr. Vol. 24, at pp. 2873-2875.)

As indicated, the raw research product, if such it may be called, often were tapes of recorded conversations which were later examined, analyzed and thereafter generalizations were extrapolated. What those who received the research of Dr. Spender obtained were the extrapolations, not the raw tapes. In this context, questions were put to Dr. Spender concerning her methodology about the gathering of the tapes:

Q. How were those tapes prepared?

A. Without their [the participants being taped] permission.

Q. Yes, but how were they prepared? In what circumstances? How did you obtain those tapes?

A. Sneakily. I planted tape recorders and I think that is made quite clear even in this, and went up afterwards and said to them, "The tape has been on. Can I have your permission to see how many minutes you talked?"

Q. Where did you plant these tapes?

A. In a bar a few times. In a staff meeting and in a colleague's office.

Q. How did you plant them?

A. I went in when nobody was there and left my tape recorder on. . . . I had a lot of tapes that I didn't get anything. . . . I mean, there's a different order of talk when people know they're being taped from when they don't.

If you actually want something that's natural, you have to trick people to a certain extent. And then the best thing you can do afterwards is say, "The tape is on." And if they say, "Look, we don't want anybody to hear that," I actually wipe the tape in front of them. . . . (Tr. Vol. 25, at pp. 2989-2990.)

Those taped were able not only to order the elimination of the entire tape, but also were able to limit rather precisely what could be examined. In this setting, questions asked of the person(s) taped included: How did they see their participation in the taped conversation? Did each person participate equally? Did either dominate the conversation? Did either abstain from full discussion to be "supportive" of the other person? (Tr. Vol. 25, at pp. 3040-3045.)

Other researchers interested in validating Dr. Spender's findings did not have access to the raw tapes - except for her doctoral thesis. Dr. Spender testified:

Q. Have you ever turned your tapes over to somebody else to analyze?

A. Well, I did for my Ph.D., yes. I mean not for someone to analyze, but

for them to be validated. Oh, yes I have used - yes, I have. Particularly for reporters at different times.

Q. For reporters?

A. Yes.

Q. For any scholars?

A. No. Not on any systematic basis, no. I mean, there are lots of problems about that. My basic rule is that you don't release tapes in those circumstances, because people are too vulnerable and too readily identified and particularly if they didn't know that that was what was going on at the time. There are lots of ethical problems about it. (Tr. Vol. 25, at pp. 2987-2988.)

It was out of such research that Dr. Spender drew the following conclusions, among others, as set out in her Notice of Evidence, Exhibit 202:

¶2. My research, which has been replicated by other researchers in several Western countries, indicates that in virtually all mixed-sex groups, from dinner parties to staff meetings and from classrooms to professional organizations, four clear patterns prevail:

(a) Men define the topics of discussion;

(b) Men talk more than women, so much so that when women speak as much as 30% of the time, they are perceived by both sexes to have unfairly dominated the conversation;

(c) Men interrupt more;

(d) Men will permit the content and direction of the conversation to proceed only on terms which they control and consider appropriate.

These findings are documented in my book *Man Made Language*, 2nd edition (London: Routledge & Kegan Paul, 1985).

¶3. Men's control of mixed-sex discussion has significant implications for women. With fewer opportunities to talk at all or to develop topics of relevance to their own interests, experience and concerns, issues of specific importance to women become invisible and marginalized. In short, in mixed-sex groupings women themselves and their opinions, ideas and experience are invalidated. Because men establish and control the rules governing who speaks and what they speak about, women's role in mixed-sex conversations becomes either facilitating discussion between men or addressing topics men select in the manner men define.

¶4. Not only do men interrupt or ignore contributions made by women which diverge from the male conversational agenda, they trivialize subject matters or conversational styles particular to women.



In effect, in mixed-sex groupings women are pressured to encourage male topics and participation at the expense of women's topics and participation. . . .

¶16. The proportion of women to men in a mixed-sex group does not necessarily significantly alter these patterns. Even a very small number of men can dominate the subject matter and its manner of discussion to the exclusion or inhibition of topics of interest to women.

¶18. I believe that one of the topics of specific interest to women which is routinely controlled or pre-empted by men in mixed-sex groupings is the inequality of women. This is true when women try to discuss the unequal participation rates or control of topic selection between men and women within a mixed-sex group, when women try to discuss the unequal representation of women in leadership positions within a mixed-sex organization or institution, or when women try to discuss policies or share in policy-making to redress sex inequality within a mixed-sex institution. Unless women's issues and views are presented in a way which is acceptable to men, women will not be given a proper hearing.

¶19. I believe, therefore, that women-only groups are the best forum for women to discuss and develop policies to remedy women's inequality. Within the context of a society which systematically undervalues or denigrates women's views, experiences and concerns, women-only groups are often denigrated and undervalued by some

women and many men. However, the historic record of independent women's groups in articulating and advancing women's interests in the pursuit of sex equality, when contrasted with the record of mixed-sex groups, sustains my belief that women-only groups are the superior vehicle for dealing with such issues.

Counsel for FWTAO asked Dr. Spender a number of hypothetical questions which brought the generalizations quoted in the Notice of Evidence closer to the issues in the matter before me. The following is illustrative:

Q. Let me put this to you. Some women may say that they like mixed-sex groups, or they feel they are well-treated there or advantaged there. Is there anything in your research that would explain that reaction?

A. Well, particularly, if one was welcomed, I suppose one would feel this was quite an advantage. I think for women who are used to being invisible, the mere act of being acknowledged can be perceived to be a very positive thing. And women are frequently invisible in all sorts of groups.

I mean, they're invisible in the curriculum, invisible in all sorts of ways. If I were to try and find some research method now to say, a teacher is a teacher, for example, most of us in this room would think of the teacher as being male.

What comes to mind all the time is the male model. So if it's simply

being acknowledged sometimes as existing, women can be grateful for small mercies. (Tr. Vol. 24, at p. 2904.)

I have difficulty giving any considerable weight to Dr. Spender's testimony for a number of reasons which, to some extent, are disclosed from the several extracts of her evidence quoted above:

- Many of Dr. Spender's conclusions derive from research, such as taped interviews, which have not been subject to validation or analysis by other researchers.
- It was unclear from her testimony to what extent, if any, the taped interviews impelling the conclusions she reached were reflective of women and men interacting in a professional association.
- Part of Dr. Spender's testimony related to *organizational behaviour*. This is a subject about which Dr. Spender made clear she does not possess expertise.
- Dr. Spender, herself, leaves each individual and each group to examine her conclusions and ask whether and to what extent those conclusions are valid. How, then, can the sweeping generalizations concerning female invisibility and male control be justified?

More to the point, perhaps, is that Dr. Spender candidly and without reservation indicated that she did *not have the expertise to comment on the questions related to "choice" as against "compulsion" in terms of organizational membership*. In this

regard, I had asked Dr. Spender to comment in reference to her expertise on institutional membership as a matter of compulsion. Dr. Spender replied:

And I don't have any expertise in that. I don't do any research on choice and compulsion. I can give an opinion and I can speculate and I can, as a well-intentioned citizen try to come to some understanding about that. *But the issue of choice versus compulsion is not one where I have any expertise whatsoever. I am an average citizen.*

Now, what would happen if you joined one organization of all women or you joined an organization in which there were women and men, I can give you an informed opinion. . . .

. . . I would think that [the question of choice as against compulsion] is much more about political science and much less about issues of conversational codes. And, I can tell you what has happened to the conversational codes in a mixed-sex or a single-sex organization. But I can, only as a layperson, comment on choice and compulsion. (Tr. Vol. 25, at pp. 2951-2953.)

For the reasons stated, I do not find that Dr. Spender's testimony added in any substantial way to the issues before me either generally or specifically as applied to the question of injury to dignitary interests flowing from the element of compulsory membership in a professional association on the basis of gender.

• **Dr. Dorothy E. Smith** - Dr. Smith, a Professor at the Ontario Institute for Studies in



Education at the time of her testimony, was Chair of that school's Department of Sociology. She was qualified as an expert in the area of sociology, specializing in women's studies in sociology and in the social organization of knowledge. (Tr. Vol. 28, at p. 3288.)

For the purposes of this matter, in my view, two works, both unpublished in the sense of being available to the general public, and without bearing a specific date of completion, though apparently done in the 1980's, are particularly relevant and formed an important basis for the direct examination of Dr. Smith. The works are: *Teaching as an Internally Segregated Profession: Women and Teachers in the Public Schools of Ontario*, Exhibit 222, authors: Dr. Smith and Dr. Yoko Ueda with Jane Haddad; and *Working Paper on the Implications of Declining Enrolment for Women Teachers in Public Elementary and Secondary Schools in Ontario*, Exhibit 223, authors: Dr. Smith, Marilee Reimer, Connie Taylor, and Yoko Ueda.

In *The Working Paper*, Exhibit 223, at p. 8, a general summary was presented which Dr. Smith in her testimony adopted as her own:

Our examination of the teaching profession suggests that it is organized internally on a segregated basis. That is, women and men teachers play rather different roles in the school system; that women generally occupy not just lower, but more subordinate positions; that they tend to be allocated different kinds of work; that they have less access to bases for promotions; that they have a typically different career structure; and that they have a different place in the overall *economy* of the profession. The situation in teaching is less markedly segregated than



in other professional fields. The avenues of access via educational qualifications are more universalistic. The opening up of opportunities for women during the war and subsequently with the increased demand of the 1960's broke down some of the more marked patterns of segregation within the teaching profession which had been established earlier. Nevertheless it persists. *Our focus then on the bases of inequalities experienced by women teachers will be on a form of segregation embedded in the social organization and the schools.*

The methodology employed in her research and that of her colleagues made heavy use of Statistics Canada data. But, the meaning to be attributed to that data was limited by Dr. Smith. This was made clear in Exhibit 222, at p. 18, note 2, where the researchers, among whom Dr. Smith was listed first, stated:

The uses made of statistical data in this paper and indeed the general method of analysis, are largely descriptive. We are not concerned to explain features of the institutional processes which disadvantage women by abstracting them as factors and evaluating their *effects*. The latter is a procedure which obscures the character of the social organization which is tapped by them in constructing the factors and causal relations among them. Indeed, we are not concerned with explanations of any kind and, therefore, in the use of data we are not seeking to evaluate hypotheses or to locate the factor or factors which contributes most to variants in the dependent variable, etc. Our interest is in the social organization and social relations underlying, expressed in, but not analyzed and described using methods such as these. *It is*

*the character of that social organization which is our object.*

For this reason, we have taken the statistical information available to us as information *arising and reflecting* a social organization which determines but is not fully available in the statistical data. We have taken the data as providing a collection of *markers* to a submerged social organizational process, coming into being in its daily actualities through the ongoing activities of actual individual[s].

This embedded segregation in the social organization and the schools, said Dr. Smith, has been extant for decades. But, she emphasized that it is not a static condition. On the negative side, Dr. Smith pointed to the increased number of part-time, occasional (contingent) elementary teachers, a disproportionate number of whom are women. (Tr. Vol. 28, at pp. 3360-3361.) On the positive side, she noted what she believed to be a significant increase in the "women's share of elementary vice-principal and principal positions, which have increased from 1973-1974, when it was 8.9 percent, to 22.3 percent in 1988-1989." (Tr. Vol. 28, at p. 3363.)

Dr. Smith seemed to see a direct relationship between FWTAO's "active role" and the increase in positions of added responsibility for women. She testified:

I've seen the very active role that FWTAO has played in attempting to further women's potentialities for advancement, and this has been very important, I think, in the women beginning both to think of themselves as people who can make advancement and to begin to know how to go about it and in the direct combatting of possible

sources of arbitrariness, discrimination and prejudice in the appointments process. And one can see these really very significant gains, I think, in the percentage point difference between the secondary and elementary staff, where the gains at the secondary level are 6.8 percentage points and 7.7 for elementary educational staff.

I think, however, though, you need to look not only at those gains in straightforward way; you need also to look at how the career process of advancement is being set up; that it is not enough to say where are women in terms of principal positions, but where are they in terms of their advancement into positions from which they can move into the position of principal and where, of course, the position of vice-principal is a really key position and here we see really very significant gains and a very significant difference, I would suggest, between gains at the secondary and elementary levels.

So, if you look at all administrative positions, other than that of principal, at the secondary level, they have improved only by 7.3 percentage between the two dates [of] 1973-1974 and 1988-1989; whereas, at the elementary level, the gains are significantly greater - that's a 17 percentage point gain from 19.3 percent in 1973-1974 to 36.3 [percent] in 1988-1989. (Tr. Vol. 28, at pp. 3365-3366.)

Dr. Smith left no doubt that women teachers, including women elementary teachers, could expect little help from their male colleagues in seeking advancement within the profession. She stated:

Men's career interests as a group within the teaching profession favour restricting access to career opportunities to men rather than opening opportunities up to the very much larger group of women. (Tr. Vol. 28, at pp. 3374-3375.)

Putting to the side any questions relating to methodology, Dr. Smith's conclusions *on the facts* give me a great deal of pause: (1) As Part II of this decision sets out in some detail, FWTAO is one of five Affiliates presently making up OTF. And, one of the major functions of OTF is to represent the Affiliates before government. Further, by and large, a central tenet of OTF is that it will not initiate any major policy proposal, such as an affirmative action program imposed by government, without *consensus on the part of its Affiliate members*.

While FWTAO has indeed spurred action to assist its members to achieve and obtain positions of added responsibilities, so have other Affiliates, including OSSTF and OPSTF. On the facts, it simply is not correct to state or imply that FWTAO was the sole causal link for the substantial increase of those women teachers who have moved to positions of vice-principal or principal. (See also, Tr. Vol. 29, at p. 3414.)

(2) Further, the statistics that Dr. Smith has used to support the conclusions reached concerning the comparison between FWTAO and OSSTF are questionable. The comparison was based on the percentage share of positions held by women during the designated years. No effort was made to look at the different levels of experience and age between male and female teachers at the elementary level and the same comparison at the secondary level. (Tr. Vol. 29, at pp. 3484-3485.) Nor was there an effort made to take into account the actual number of positions that became



available for males and females. (Tr. Vol. 29, at p. 3485.)

In addition, according to Dr. Smith, a way to determine how effectively an organization impacts in terms of opening positions of added responsibility to women teachers is to measure progress through proportional representation. (Tr. Vol. 29, at 3484-3485.) If this had been done, then the secondary school panel (OSSTF) would have achieved a respectable 75 percent vis-a-vis the elementary school panel. (Tr. Vol. 29, at pp. 3485-3486.)

Central, however, to that which I must decide relates to the matter of compulsion. It is that which is contested in these proceedings under the *Human Rights Code*. The Complainants are denied membership in OPSTF because they are required by an OTF by-law to be statutory members of FWTAO *solely on the basis of their gender*.

While it is true that ¶19 of Dr. Smith's Notice of Evidence strongly endorsed the continued operation of FWTAO as an autonomous association, it contained nothing relating to the element of compulsory membership. Nonetheless, Dr. Smith was asked her views as to whether FWTAO should become a voluntary association. Her response was:

It would be seriously detrimental to the ability of FWTAO to represent the interests of women teachers. A voluntary organization has, first of all, a major problem in that a great deal of its work has to go into securing its financial base, so you would have to put a lot work into that process, and, indeed, make quite major expenditures as part of the fund raising process.



Perhaps, more important is the problem that the kind of situation we have been looking at is one that has naturalized women's view of the state of affairs in which men's normal career is a standard for them and which they have come, to a very large extent, to take for granted as disadvantages [to] their family responsibilities and to treat as normal that they would not expect to, themselves, seek to be principals or seek for other advancement.

We have the situation that women are practised at speaking up. They are not practised in knowing how to treat each other as authorities.

It seems to me essential to have a mandatory women's organization if, in fact, an organization is going to be able properly to relate to women who may not yet have had an opportunity of learning to think about themselves differently, or learning to think about their rights and ability to speak up and be heard differently or to see that women can be organizationally effective and in positions of leadership. (Tr. Vol. 28, at pp. 3390-3391.)

Yet, it must be asked: To what extent does the statement of Dr. Smith reflect her expertise and, in that regard, the studies in which she was involved? This query was put to Dr. Smith by Counsel for the Commission. Dr. Smith answered:

A. I can't say that it's in my area of expertise as it has been formally defined here, but certainly I feel, in terms of the kind of quite extensive

experience I've had as an *activist* and *organizer* in the women's context, that I feel I do have an expertise. . . .

Q. Do you see it [compulsory membership in FWTAO] as essentially a political question?

A. Yes, although I would like to reserve the rather more general use of the notion of politics that has become normal in the women's movement, which I think is not to do with specific political parties or political institutions as such, but is to do with the organization of relations of power, yes. (Tr. Vol. 29, at pp. 3448-3449.)

Dr. Smith related her "expertise" to comment on the matter of compulsory membership in FWTAO on the basis of her long experience as an *activist and organizer in a women's context*. Whatever may be the merits of such experience, it certainly bears scant relationship as to that for which Dr. Smith was qualified as an expert in these proceedings. Moreover, I note that *nothing was said as to her view of compulsion in her Notice of Evidence. That subject arose a few weeks before her testimony in discussions with Counsel for FWTAO*. (Tr. Vol. 29, at pp. 3449-3450.)

However, let us move to the rationale in support of Dr. Smith's endorsement of compulsory membership. She was asked by Commission Counsel whether her position was based on an assumption that women teachers "have an impaired capacity to choose." (Tr. Vol. 29, at p. 3451.) Dr. Smith replied:

[T]he point I wanted to make was that many women may not be

aware . . . of the kinds of disadvantages they are subject to. In fact this was, I think, the kind of striking experience in the early days of this phase of the women's movement, was the discovery of ways in which we were disadvantaged, that we did not know about. And I wish I could say that all women in this society did have this awareness, but they don't. And, therefore when it comes to making choices, they may make choices on bases which don't fully recognize the ways in which there are barriers and the barriers entered into - as assumptions to the choices they make. (*Ibid.*)

Next, Commission Counsel asked Dr. Smith to relate her reasoning to female elementary school teachers. Dr. Smith answered that she had not done a study on the question. However, she offered this analysis:

[I]t seems to me . . . of very great importance that women are able to participate in communication channels which address their issues in an ongoing way. And, that's one of the reasons that I think it's so important that you have mandatory membership in a women's organization, because that's what it supplies. It supplies that ongoing connectiveness through whatever forms of newsletters and various forms of communication, the opportunities that women may have to be engaged in various kinds of workshops and so on.

Those kinds of things, I think, are absolutely vital, because one of the striking features of the kind of way things were put together, and still are put together, is that institutionalized channels of communication,

on the whole do not serve women. And, what you have, in a way, as almost a fortunate historical accident in FWTAO, is the establishment of an organization which actually does institutionalize communication among women and for women. (Tr. Vol. 29, at p. 3452.)

Assume that FWTAO does indeed provide the communication channels for women elementary school teachers. Does it follow that women elementary school teachers should be compelled to be a part of such channels solely because of their gender?

To Dr. Smith, it was enough to say that since there was acceptance of mandatory membership in OTF:

I can't see that there's a particular problem about mandatory membership in a women's organization. (Tr. Vol. 29, at p. 3454.)

However, in a somewhat extended hypothetical question, Dr. Smith seemed to qualify her commitment to mandatory membership - if the organization's membership reflected views which she would find particularly offensive:

Q. Dr. Smith, if you were required to be a member of a particular group based on the fact that you were a female - an all-female group - and it was said that you will be required to be a member of the group because it was going to advance the position of women -

A. Yes.

Q. - and you attended those meetings of the organization, you became very familiar with their goals and their strategies, and you realized that you had a profound disagreement with that organization, to the point that you thought that it was detrimental to women. You realized you were in the minority. There was no practical possibility of changing that situation. Would you still be in favour of being required to be a member of it and to support it with your funds?

A. It would depend, I think. In this situation I would, yes. In other situations - I mean, you know. . . .

Q. It's a hypothetical question.

A. I know it's a hypothetical. I hate hypothetical questions. I know you like them because they sort things out for you in terms of *yes* and *no*, but I don't confront the world like that, so, you know. . . .

Q. Degrees, degrees.

A. Yes. Well, okay, degrees, yes. I like to sort of say: "Well, okay," you know, like, "Give me the actual situation, you know, and then we'll sort it out," right? Are you talking about mandatory membership in REAL Women, for example?

Q. Yes. Yes.



A. Then I would have trouble, yes, with that, you bet. (Tr. Vol. 29, at pp. 3458-3459.)

Partly because I believe Dr. Smith was not qualified as an expert as to the issue of compulsion, described above, partly because her approach to the issue seemed to be that of an advocacy rather than objectivity, and partly because there seemed to be problems with the internal logic of that which brought her to the conclusions stated, I cannot give her testimony weight on this question.

- **Professor Marguerite A. Cassin** - Professor Cassin, at the time of her testimony on July 5, 6 and 24, 1990 was an Assistant Professor at the School of Public Administration, Dalhousie University, in Halifax. She had completed her doctoral thesis concerning what Professor Cassin called the routine production of inequality, which in fact was the subject of much of her testimony in these proceedings.

Dr. Smith, referred to above, was her thesis supervisor, and had served in that position for Professor Cassin's master's thesis. Indeed, Professor Cassin had worked with Dr. Smith as a research associate in the preparation of a brief for FWTAO concerning declining enrolment and its effects on Ontario elementary school teachers. (Tr. *Extract*, July 5, 1990, at pp. 13-14.) (Professor Cassin had completed all the requirements for her doctorate, both as to courses and thesis. She was scheduled to receive the degree a few months following her testimony.) (Tr. Vol. 40, at pp. 5502-5504.) )

Professor Cassin was accepted as an expert in theories of organization management and administration including that aspect of the effect of organizational modes and

processes on the status of women. Inequality between men and women teachers at the elementary level in Ontario, said Professor Cassin, has deep roots. It arises out of the structures and norms created by and for men. Its necessary effect is to place men in positions of added responsibility and to deny comparable positions to women unless they not only meet so-called "objective" criteria set by men, but also adopt the same norms as the men. This latter point is what Professor Cassin calls a *gatekeeper price*. Professor Cassin stated:

Now women are foreigners to this terrain [of positions of added responsibilities], and women's gender is a disadvantage in my opinion in these settings. One of the things also is that men are in various ways uncomfortable with women as their colleagues, and so what you see is a pattern that by and large women gain entry into . . . senior positions by being absolutely outstanding in every respect and exceptional. So because of course they must meet the same criteria as men to gain entry, but in addition they also must pay a gatekeeper and this gatekeeper price is that they must adopt the same assumptions about education, administration, criteria for advancement and so on as their male colleagues.

Now to the extent that these assumptions are gendered, it means that women will act in these positions in ways that conform to the norms and assumptions established by men. (Tr. Vol. 39, at p. 5458.)

There were some of what I took to be key examples of the routine production of inequality. They seemed to be offered as proof of Professor Cassin's thesis. Because of

the length of this decision, I will take only a single example, namely, that relating to the salary grid. However, I will describe that example in some detail.

Professor Cassin stated:

The salary grid [for teachers, including elementary school teachers] has been constructed on an *objective* and *egalitarian* basis. In salary terms, teachers are treated equally irrespective of gender or teaching location in the public school system. . . . However, this is precisely the problem. (Tr. Vol. 39, at p. 5423.)

Professor Cassin makes the point that the grid, as it was structured, disproportionately rewarded men. There were (and still are) more men in the secondary system where entry long was conditioned in part on holding an undergraduate degree. Those teaching in the elementary system did not have to hold such a degree until 1972. However, the elementary school teachers (as well as a lesser number of secondary school teachers) without a degree (referred to as the B, C and D categories) were at the bottom of the teacher pay scale. This was a condition that rewarded men, and failed to recognize the value of the practical experience of women. (Tr. Vol. 39, at pp. 5424-5425.)

Professor Cassin testified:

[B]ut back at the time [when the grid described above was established], however, it is my opinion that really quite a big injustice was done to elementary school teachers at this time because there was quite a lack of

recognition of the forms of professionalism that they had which were actually different from secondary [school teachers]. But, I think it is not proper to think that we could return to that time. This is sort of cumulative effect thing that I talked about in the beginning [of testimony. (Tr. Vol. 39, at p. 5427.)

Explicit in Professor Cassin's testimony is that the grid, coupled with a degree requirement for higher pay, was either foisted on elementary teachers, or was absorbed by them as part of a reflection of a male-dominated educational system. The facts are quite different. Those facts are to some extent set out in the next section of this part of the decision relating to Monica Townson. And, they are more fully described in Part II of the decision.

Briefly, however, the facts, as I understand them from the record, are that what Professor Cassin would characterize as male-dominated Affiliates, OSSTF and OPSTF, sought to end and upgrade the classification of teachers who did not possess a university undergraduate degree - the B, C and D categories.

The teachers in these categories were at the bottom of the pay scale. No amount of experience or classroom skills would bring them to the level of the person entering teaching for the first time equipped with an undergraduate degree and a diploma from the relevant faculty of education.

In 1972, a change was ordered by law. At the start of the 1973 school year, a necessary condition to certification for teaching in Ontario was an undergraduate degree.

However, this requirement was grandparented. By 1978, a total of 52.7 percent of *all*



women elementary public school teachers and 19.7 percent of *all* men elementary public school teachers had no undergraduate degree. And, as late as 1987, a total of 35.1 of *all* women elementary school teachers and 11.8 percent of *all* men elementary school teachers had no undergraduate degree. (Exhibit No. 15, at p. 78, Table P5: *The Status of Women and Affirmative Action/Employment Equity in Ontario School Boards - Report to the Legislature by the Minister of Education, 1988*. This Exhibit is duplicated in Exhibit No. 485.)

OSSTF had established at a far earlier time a four-category evaluation system that effectively eliminated the lower classification for non-degreed teachers in the secondary schools. OSSTF wanted to protect teachers (largely female) who had come to the classroom with business experience and those (largely male) who taught such subjects as automotive repair and welding. Both of these groups were skilled, but they often did not possess undergraduate degrees. This was done by 1959. (See, Tr. Vol. 10, at pp. 1191-1193; Exhibit No. 660.)

Elementary school teaching qualifications are determined by a body called the Qualifications Evaluation Council of Ontario [QECO], established by the four relevant Affiliates: OPSTF, FWTAO, OECTA and AEFO. No major change in policy can be made without the consent of the four association members. (Tr. Vol. 37, at p. 5033.)

In 1986 and 1987, OPSTF put before QECO actions on the part of some northern Ontario locals that had negotiated steps toward a four-category system into their collective agreements. And, having done that, OPSTF suggested that QECO, itself, adopt the four-category system as a policy. This was preceded by an OPSTF proposal



which would have allowed non-degreed teachers who had successfully completed 15 hours of *Ministry-approved courses* to be treated as if they had obtained their undergraduate degree and thereby be placed in classification A-1. (See, Tr. Vol. 102, at pp. 14255-14280.)

It is, I believe, fair to say that there was a sufficient measure of questioning within FWTAO to preclude that organization's membership from endorsing the four-category system, and eliminating the three special categories for non-degreed elementary school teachers. The convolutions of proposals, rejections and counter-proposals at FWTAO annual meetings are noted in Tr. Vol. 37, at pp. 5029-5052.

What became FWTAO policy were decisions by that organization's executive and board of directors to endorse a proposal which would give to non-degreed teachers the minimum pay of a category A-1 entry-level degreed teacher. And, at the same time, at the 1988 annual meeting, there was a resolution approved which called for evaluation of teachers on the basis of QECO evaluation and experience. (Exhibit No. 369, Tr. Vol. 37, at p. 5052.)

Having said this, FWTAO gave its "oral support" to the four-category proposal put to QECO. There were no briefs or other forms of written submissions presenting arguments reflecting that support. (AEFO and OECTA had indicated their opposition to the four-category proposal, but the matter had been returned to the Affiliates for further consideration.)

Joan Wescott, Executive Director of FWTAO, suggested that the organizational strategy was to encourage its non-degreed members to take those courses which

would result in obtaining an under-graduate degree. (This approach seems quite similar to that which Professor Cassin criticized as emanating from a male-dominated institutional environment.) Ms. Wescott stated:

I recall particularly discussion at the 1986 [FWTAO] annual meeting. And, I think I made reference to that as the time at which we established our particular pre-degree loan fund. My recollection of discussions at previous annual meetings related much to the encouragement and how pleased we were to note each year the number of teachers who had been successful in attaining their first degree and that is one of the aspects of the statistics of our membership that we looked at almost every year because of the excitement at the percentage of members who had been able to improve their qualifications through the degree process and thereby attain . . . [QECO] level A. . . ." (Tr. Vol. 34, at pp. 4312-4313.)

This view is in contrast with the reality as seen by a staff member of the FWTAO executive called by FWTAO as a witness:

Q. Have you heard the argument [that] maintaining B, C, D categories acts as an incentive for individual members to obtain their degrees?

A. Yes, I have heard that as an argument, but in fact I think that what we have found over the years is that in fact it is not how it works for women, that even though there is ostensibly this financial reward which is intended - I suppose in the original construction it was

intended as an incentive to get further qualification. In fact, you know, it wasn't working for women because of the kinds of career patterns they had and because of obligations they had that they just couldn't get out of those categories as easily as one might have assumed twenty years ago. (Tr. Vol. 43, at p. 6000.)

Elimination of the B, C, D categories was not a formally designated priority of the FWTAO board of directors. For example, it was not included among its articulated written priorities submitted to the organization's annual meeting for the years 1985 to 1990. (Exhibit No. 234.)

Professor Cassin's argument that the salary grid with special reference to the B, C, D categories has been carried forward as a way to prefer male teachers as a reflection of male-dominated unions, in my view, has no foundation in the facts. Indeed, a mixed-gender union, OSSTF, which Professor Cassin finds in principle inadequate to advocate women's interests, initiated the attack against the grid preference for non-degreed teachers in the 1950's. And, that challenge was directed against the grid as applied to elementary school teachers first by OPSTF. (As noted, the grid is further discussed in the next portion of this section concerning the expert witness, Monica Townson, and in Part II of this decision.)

Now, however, I will move to Professor Cassin's remarks on the matter of compulsory membership. Substantial testimony on direct examination was given by Professor Cassin. (Tr. Vol. 39, at pp. 5469-5480.) However, it should be noted that nothing in Professor Cassin's Notice of Evidence was specifically addressed to the subject of compulsion. (Tr. Vol. 40, at pp. 5619-5620.) Professor Cassin suggested that

the element of compulsory membership was assumed throughout her discussion in the Notice of Evidence. (Tr. Vol. 40, at pp. 5620-5621.)

In any event, Professor Cassin offered a number of reasons why compulsory membership was necessary. But, none of the reasons touched upon or considered *the impact of compulsory membership on individual members who strongly disagree with the organization* :

Q. Do you have any views on what the effect is on a member of being required to be a member of an organization with which he or she strongly disagrees?

A. No. (Tr. Vol. 40, at p. 5636.)

There seemed to be a three-fold thrust to Professor Cassin's position:

(1) FWTAO is a necessary organization to protect and enhance the interest of female teachers. Voluntary membership would endanger the stability of institutional resources, which, in turn, would affect organizational effectiveness.

(2) A female-only organization, such as FWTAO, provides women a forum to talk with one another, to instill a kind of consciousness-raising so that they can better understand the reality of a male-dominated educational system. At the present time, women teachers probably cannot make an informed judgment in terms of choosing between an all-women association and one of mixed-gender. Precisely because of male domination and corresponding female subordination, they are likely to choose



the mixed-gender association.

(3) In any event, the issue here is not about human rights. The issue relates to one union attempting to raid another for the purpose of obtaining membership fees. (Tr. Vol. 40, at pp. 5622-5633.)

In cross-examination by Commission Counsel, the following was asked and answered by Professor Cassin:

Q. Your conclusion from this, however, then is that women should be forced to join a single-sex organization whether they agree that that is best for them or not, whether they agree with the organization or not, or whether they have very strong views that they, being aware of the problems [inherent] in mixed organizations, still wish to join because they think they are capable of dealing with them, and this [compulsory membership] will prevent those people from joining?

A. In this circumstance, yes, I do. (Tr. Vol. 40, at p. 5635.)

Professor Cassin, herself, noted that compulsory membership could channel individual thoughts and beliefs. That is, she expressed the view that it was more important for the group (FWTAO) to speak with one voice, than for individual women to be given the opportunity to resonate in public with many voices. In direct examination, Professor Cassin volunteered the following comment:

You see, one of the things is that in the kind of mixed-sex organization



not all women have the same opinion. You know, I am not presenting women as having the same opinion on all matters. *At this point in our society when women's opinions differ in mixed-sex organizations, or indeed when they are seen to differ in public, then this in fact undermines the sorts of efforts towards defining the kind of social equality. I'm not saying there always has to be a uniform public front in every single organization, but what I am saying is we are in a period of time around this gender issue which is still very politically charged in a whole variety of settings and the possibility of progress really depends upon there being sort of what I would call sites in which we can preserve a basis for women to try to sort things through and develop strategies and policies and stuff in view of a together consideration.* (Tr. Vol. 39, at p. 5477.)

If women did not want to be streamed into a single decision, then Professor Cassin's answer was: The dissenters need not participate. She stated:

It strikes me that there will be lots of disagreements internally in the organization of a whole variety of kinds. And it strikes me that people who, you know, very much disagree with it simply don't participate . . . . I mean, it seems to me a fairly normal sort of matter. This isn't as if this is a unique situation in this society. (Tr. Vol. 40, at p. 5628.)

It would follow that if individuals felt strongly that the direction of the organization, itself, was fundamentally in error, their choice would be not to participate, which is precisely what the Complainants in this matter have chosen to do. Yet, they

remain bound to the organization as statutory members solely because of their gender. I recognize that Professor Cassin addressed herself to the organization and what she believes organizationally is necessary to achieve gender equality. I have questioned some of the basic facts, such as the grid, used by Professor Cassin in reaching her conclusions as applied to organizations.

However, more to the point, my concern here is with individuals and, in particular, I have asked whether any of Professor Cassin's testimony in support of compulsory statutory membership on the basis of gender can be justified on the ground that there was no injury to dignitary interests. In the result, I do not find that demonstration has been made by Professor Cassin.

- **Monica Townson** - Ms. Townson, President of Monica Townson Associates Inc., Ottawa, was accepted as an expert witness in the area of economics specializing in women in the workforce. (Tr. Vol. 50, at p. 6805.) Apparently, her acceptance as an economist was based on her experience. From 1972 to 1975, she was financial editor of the *Financial Times of Canada*; from 1975 to 1977, she was an economist/writer in the economics department of the Royal Bank of Canada; from 1977 to 1978, she was Vice-President and Director of Research to the Canadian Advisory Council on the Status of Women; from 1978 to 1979, she was Senior Economic Advisor for the Centre for the Study of Inflation and Productivity; and from 1979 to 1981, she was Chief, Public Communications, Economic Council of Canada.

From 1981 to the time of her testimony, Ms. Townson was President of Monica Townson Associates, a position which she described as being an "independent economic consultant and free-lance journalist." (Exhibit 528(a).) Her post-secondary

education was at the London School of Economics where she received the degree of Bachelor of Science in Economics with honours in 1954. Her major was trade and industry. (*Ibid.*; see also, Tr. Vol. 51, at p. 6891.)

While Ms. Townson was accepted as an expert in the area of economics with specialization relating to women and the workforce, I think it important to note some of the limitations incident to her expertise:

- She has neither published nor researched the subject of women in unions. (Tr. Vol. 51, at pp. 6891-6892.)
- She is not an expert in statistical methods. (Tr. Vol. 57, at p. 7843.)
- She is not an expert in organizational behaviour. (*Ibid.*)
- She is not an expert in collective bargaining processes. (Tr. Vol. 57, at pp. 7843-7844.)
- She is not an expert, nor does she possess any special knowledge concerning the Ontario public school system. (*Id.*, at p. 7844.)

In my view, there were two parts to Ms. Townson's testimony. First, she described ongoing (from 1901 to date) entrenched job discrimination against women.

Elementary school teachers, though somewhat better treated, were seen to be part of this discrimination. Second, Ms. Townson related those findings to the need for FWTAO and, in that regard, for compulsory membership in that association. While this second part of Ms. Townson's opinion is more immediate in this segment of the decision, I will deal as well with the first part of her testimony.

Drawing for the most part, though not exclusively, as we shall soon see, on data

from Statistics Canada, some of which were specially commissioned by Ms. Townson, she stated that 73 percent of those women who were in paid employment in Canada during 1989 were found in five general occupational groups: 31%, clerical; 17%, service; 10%, sales; 9%, medicine and health; and 6% teaching. On a Canada-wide basis in 1978, a woman who worked full-time in all occupations earned 63% of a man who worked full-time for a full year. By 1988, that gap had narrowed to 65.5%. (Tr. Vol. 50, at pp. 6818-6819.) On the whole, the same percentages applied to Ontario. (*Id.*, at pp. 6819-6820.)

But, from our viewpoint, what are the data relating to school teachers? Ms. Townson stated:

Judged by some of the criteria, it may appear that women teachers are perhaps in a more fortunate position than women in general. For example, . . . the wage gap between men and women with a university degree - which is what teachers must have - is narrower than between women and men with less years of formal education. And, the average earnings of women teachers who worked full time for a full year in 1988 were 80% of the average earned by male teachers with full-time jobs.

As well, unlike women in the economy generally, a high percentage of women teachers are unionized. For example, in 1986, which was the most recent year for which I had data, only about 29 percent of women and 39 percent of men in paid employment in all occupations in Canada were union members. But, where there is a high degree of



unionization, that tends to improve the economic position of workers, and I think that is what has happened in the teaching profession. (Tr. Vol. 50, at pp. 6826-6827.)

The comparisons Ms. Townson claimed she had made were on the basis of wages *actually paid*. She stated:

I am looking here at what women and men actually earn; not at what the wage rates are specified in the collective agreement because, while women and men may start out at the same income levels, as they accumulate more experience, that wage gap increases. . . ." (Tr. Vol. 50, at p. 6829.)

Ms. Townson was emphatic that whatever might be the more "favoured" position of women teachers relative to other women, they had not achieved equality with men teachers. (Tr. Vol. 50, at p. 6827.) Counsel for FWTAO referred Ms. Townson to Exhibit 529(a), ¶24, Table 1. The data contained therein, according to Ms. Townson, brought these conclusions: She described a

. . . significant wage gap between women and men teachers in Ontario. That's illustrated in Table 1 [cited above], where there is a comparison between Ontario and Canada. You can notice there the salaries, the number of men and women teachers who are in the various salary ranges in Ontario and in Canada.

What you can see from that Table [1] is that, among full-time



elementary school teachers in Ontario, for example, 44 percent of male teachers earned more than \$44,000, while only 23 percent of women teachers earned more than \$44,000.

. . . At the other end of the salary range, if you look at the low end of the salary range, less than 8 percent of male teachers earned less than \$25,000 a year, while 28 percent of women elementary teachers were in this salary range. At the national level, 10 percent of men teachers earned less than \$25,000. Thirty percent of women teachers were in that salary range. (Tr. Vol. 50, at pp. 6830-6831.)

Ms. Townson offered reasons for the wage gap, as she saw it:

The lack of opportunity that women teachers have for promotion means that they are usually concentrated at the low end of the salary ranges and, as well, interruption in service that women teachers have because of child-bearing and child-rearing responsibilities, for example, tend to mean that women teachers, on average, earn less than men teachers who have the same educational qualifications or the same number of years of teaching experience.

There is also occupational segregation within the teaching profession. That is, women teachers tend to be assigned to lower paying jobs. For example, as principals of smaller schools rather than of larger schools, and so on. So women teachers have by no means achieved equality and that means, in my view, that special efforts will be needed to increase

the general awareness of these inequalities that persist and to address them so that we can find solutions to that. (Tr. Vol. 50, at pp. 6827-6828.)

Ms. Townson expanded on the under-representation of women in positions of added responsibility. Her comparative in terms of what should yield equity was in relation to the *total number of teachers*. So it was that she spoke of women representing 71 percent of all full-time elementary teachers but only 2.8 percent of whom held positions of added responsibility at the elementary level in terms of the positions of principal and vice-principal during the school year 1988-1989. (Tr. Vol. 50, at p. 6832.)

There is little question as to the under-representation of women in positions of added responsibility (PAR). The OTF and all of the Affiliates have urged and participated in affirmative action programs in this regard at both the primary and secondary levels. FWTAO, for its part, had made PAR a "top priority" since 1980. (See, Exhibit 483(e), at pp. 4-5: *Affirmative Action Employment Equity, FWTAO 1990*.)

Effective September 1990, Chris Ward, Minister of Education, made mandatory employment equity policies with respect to hiring and promotion of women. The objective relating to PAR, as applied to women, was raised from 30 percent (an earlier guideline goal) to a mandatory 50 percent by the year 2000. The PAR positions related to the jobs of supervisory officer, principal and vice-principal. All other positions could hold to the 30 percent goal. (Ex. 485, at p. 9: *The Status of Women and Employment Equity in Ontario School Boards: Report to the Legislature 1989*. This exhibit is duplicated by Exhibit 15.)

I mention the Ministry's employment equity policy because of the contrast in measurement that it provides to that set out by Ms. Townson. It is one matter to set targets, even mandatory targets, as to PAR positions based on teaching membership. (For example, it could be argued that if women make up 70 percent of the primary public school teaching staff, they should have 70 percent of the PAR positions.) *But, that is not how Ms. Townson expresses the matter. She relates the number of PAR positions in relation to the total number of teachers. Thus, for the school year 1988-1989 at Ontario public elementary schools, principals and vice-principals accounted for 9 percent of the total teaching staff. (Tr. Vol. 51, at pp. 7019-7020.)*

There are other examples which have led me to question the opinions expressed by Ms. Townson:

(1) As part of her reasoning as to occupational segregation, Ms. Townson stated that women who obtain PAR positions may be assigned to lower paying jobs by, for example, being sent to smaller schools. (Tr. Vol. 50, at pp. 6827-6828.) In the result, Ms. Townson could not recall the basis that led her to make the statement. And, in any event, she had not done a statistical correlation between school size and gender. Nor had she done a correlation between salary and school size. The following exchange bears repeating in this decision:

Q. . . . Could I refer you to ¶21 [of the Notice of Evidence] and your statement that occupational segregation within the teaching profession may also mean that women are assigned to lower paying jobs, for example as principals of smaller schools rather than larger ones? Have you performed a correlation between school size and gender of

principal in the public elementary system?

A. No. This was information I got from background documentation and reading.

Q. What information is that?

A. That principals of smaller schools, whether they are male or female, may tend to be paid lower than principals of larger schools.

Q. Did that information have an actual correlation?

A. A correlation between what?

Q. School size and gender of the principal.

A. No. This is not based upon school size and gender of the principal. It's based on school size and salary and the fact that more women may be assigned to smaller schools that pay lower salaries than bigger schools.

THE CHAIRMAN: The use of the word *may* - how are you using the word *may*?

THE WITNESS: That may indicate the situation or that would indicate the situation.



THE CHAIRMAN: What are the facts? Do you know? I'm trying to understand your language and what you mean by it. The language used is *occupational segregation within the teaching profession may also mean*, and I just want to know what you mean by that.

THE WITNESS: It is my understanding that it is the situation that women tend to be more often assigned as principals to smaller schools than to bigger schools and that salaries earned by principals of smaller schools are probably lower on average than those earned by principals at larger schools and that this is a form of occupational segregation within the teaching profession.

MR. JURIANSZ: My question is have you done or do you recall actually seeing a statistical correlation between school size and the gender of the school's principal?

A. That is not what I am saying here, and I think there is a misunderstanding. What I am saying or what I was trying to say was that there may be a correlation or there probably is a correlation. And I use the word *may* because I don't have the data here in front of me, but a correlation between the salary and the school size regardless of the gender of the person who is doing it. If you accept that and then you look at the gender of the people assigned to schools by size, and if you say the salary of principals of small schools tends to be lower than those of principals of larger schools and women are more often assigned to smaller schools, then the conclusion is that that is a form

of occupational segregation. And that may be one reason for lower earnings.

Q. . . . I asked a question, and I'll ask it again. Have you done a statistical correlation between school size and the gender of the school's principal?

A. No. (Tr. Vol. 51, at pp. 6988-6991.)

(2) Considerable space was given in Ms. Townson's Notice of Evidence to a demonstration that women public elementary teachers are paid less than their male colleagues. She emphasized that her concern was with the sums actually paid, and not salary scales. She found, using that standard, significant differences in pay differentials which in Ms. Townson's view demonstrated systemic discrimination. Stated discrimination could not be found because the pay scales were the same for both genders. (Exhibit 529, ¶s 18-34, at pp. 6-16.)

An important part of that which led her to the conclusions stated was that women teachers were concentrated at the lower end of pay actually received. What Ms. Townson has *not stated* casts a very different light on the conclusion reached:

- Ms. Townson did not factor into her analysis the fact that a significant number of elementary school teachers were at the lower end of the pay scale because they did not have a university degree, a requirement imposed in 1972. In 1976, for example, 20 percent of all elementary public school teachers were so categorized (called B, C and D categories.) Of this total, 83 percent were

women. It follows that relative to men, women would tend to be at the lower end of the pay scale in terms of what is actually received. (See, Tr. Vol. 51, at pp. 6937-6938. See also, the extended discussion of the grid in relation to the testimony of Professor Cassin, *supra*.)

- The effect of maternity leaves were not identified. The data shows average earnings for the year. So, if time were taken when the teacher had no earnings, then that would reduce average earnings. (Tr. Vol. 51, at p. 7007.)
- The wage discrepancies found by Ms. Townson did not factor in qualifications or experience, especially in terms of how such matters are treated under the operative collective agreements. (Tr. Vol. 51, at pp. 6982-6983.)

(3) An effort was made by Ms. Townson to articulate a PAR standard for OSSTF, which may or may not have validity but that, in my view, had little relationship to her expertise in these proceedings as an economist. There was the following testimony:

Q. Do you agree necessarily with the setting of the objective of 34.7 per cent [PAR] for secondary [schools, reflecting the percentage of female secondary school teachers]?

A. No. I don't, because - for a number of reasons, one of which, of course, is that experts have pointed out that there is a serious need for young women in the secondary school system to have women as

role models. It is also generally agreed that women teachers are seriously under-represented at the secondary level. . . . (Tr. Vol. 50, at pp. 6860-6861.)

Ms. Townson then referred to the percentage of women who had university degrees relative to the total number of labour force participants. This was 41 percent. Thus, Ms. Townson argued that 41 percent would be a "modest" start as a PAR goal for secondary female teachers. (*Id.*, at pp. 6860-6863.)

I repeat: There is no criticism of the argument. But there is real doubt as to whether I should give any weight to that argument in the context of Ms. Townson's qualifications as an expert in the area of economics.

It is essentially this same criticism that applies to Ms. Townson's testimony relating to choice between a single-gender association and one that is of mixed-gender, as well as the desirability of compelling membership in an association on the basis of gender. I think there is no need to elaborate as to why her views cannot be given special weight other than to restate the essential parts of her testimony bearing in mind that she was qualified as an expert in the area of economics. This is what Ms. Townson said:

A. . . . [T]he kind of measures that women need for them to achieve equality within the elementary school system would best be found in an organization that's composed entirely of women, for a number of reasons: First of all, that type of organization would make this a priority. Secondly, an organization composed entirely of women would



not only be sensitive to the kind of support systems that women need, but also would understand how to develop those support systems because this is part of their personal experience. Thirdly - these are not necessarily in order of significance or importance - because of that backlash that appears to be developing. . . . I think it's much less likely that a mixed-sex organization would give the kind of commitment to the measures that are needed for women to achieve equality than an organization composed entirely of women. . . .

THE CHAIRMAN: That last point, is it based on any observed information?

A. The backlash?

THE CHAIRMAN: Yes. As applied to a mixed-sex union. I take it that is what you were implying?

A. No. The point that I am making is from my own experience in dealing with various groups and so on. I have observed that there is a backlash against special programs for women on the part of men in mixed organizations. I have not done any detailed research on it, but this is based on my own observation in working with such groups. And I feel that is particularly likely to happen in times of recession. My observations indicate that is what happens when the economy is not doing as well as before. . . .

The other point that I would make . . . is that the Ministry of Education in Ontario is quite clearly committed to the achievement of equality for women in the elementary school system and, indeed, the secondary school system, too. . . .

It seems to me that, given that commitment . . . it would in fact be very useful for the Ministry to have an organization composed entirely of women that is dedicated to the objective that the Minister is and that can give him advice and support in helping him and the Ministry reach the goal. It seems to me it would have much more effect if it is coming from women who are sensitive to those issues and who are developing programs to meet those objectives.

MS. EBERTS: Q. Let me ask you another question about this organization that you suggest is necessary. What would be your view of an organization in which membership is compulsory if you are a woman?

A. I think that is entirely appropriate because if this organization is working on behalf of women, the achievements that are made will benefit all women. And it is logical to me to require that all those who benefit from the efforts of the organization should be required to contribute to it.

Additionally, I think if the organization is going to provide support to the Ministry in reaching its goal in the way I described a minute ago,

it would also be appropriate, it seems to me, to require that women contribute to it and that gives added force and influence in developing policies for women in that you can say that this is the representative of all women and they are all contributing to it and it is supporting the objectives of the Ministry. (Tr. Vol. 50, at pp. 6885-6888.)

One need only add that, accepting what Ms. Townson said as true, it does not deal with the question of compulsory membership as it relates to injury to dignitary interests. It speaks to the collective weal and not the fundamental rights of the individual which are protected by the *Human Rights Code*.

• **Dr. Linda Briskin** - Dr. Briskin, an Associate Professor at York University, Toronto, teaches in that institution's Department of Social and Political Thought which she indicated is a problem-oriented inter-disciplinary graduate program. (Tr. Vol. 73, at pp. 9626-9627.) Professor Briskin described her doctoral thesis as dealing with the areas of political economy and social history. She has taught courses relating to women and society, women and work, and feminist thought.

A significant amount of her published work describes and analyzes women and their concerns as applied to trade unions. In this regard, Professor Briskin had some in-depth experience with, for example, the Ontario Public Service Employees Union. (See, Exhibit 625, and Tr. Vol. 73, at p. 9650.)

Professor Briskin was asked by Counsel for FWTAO to state whether there was an "overriding theme to [her] research interests." Professor Briskin answered:

difficulties establishing their expertise in the eyes of students.

The subject areas of women faculty often exacerbates these tensions; for example, it might be easier to establish expertise in the sciences than in the social sciences. This finding reinforces other studies which show that students have different expectations of female and male teachers; in particular, students have an ambivalent relation to the authority of female teachers. One study found students accepting high standards, discipline and toughness from their male teachers and deeply resenting any such behaviour from their women teachers. (Exhibit No. 626, at pp. 9-10.)

Professor Briskin then linked these conclusions as a way of demonstrating that:

... women teachers have different workplace experiences than men, and often face gender-specific challenges to their expertise and authority. The link between workplace and union power and credibility suggests that women teachers enter unions from a disadvantaged position and have gender-specific concerns which unions must address. *This reality about the educational system is an important structural underpinning for women centred organizing in the educational sector.* (Notice of Evidence, ¶21, Exhibit No. 626, at p. 10.)

The research done by Professor Briskin on this subject related to authority and expertise between teachers and students and between teachers. However, that work



focussed on university students at a single institution. It did not involve those students. That is, they were not observed by Professor Briskin or researchers working with her. Rather, it related to a focus group of male and female teachers.

Moreover, even if I should accept the conclusions reached by Professor Briskin, I would have difficulty applying them to elementary schools. Recall that it is Professor Briskin speaking as an expert and applying her theories to the elementary school environment. Yet, and this point shall be repeated, Professor Briskin had limited knowledge of the public elementary school environment in Ontario. It was limited to reading 1,400 pages of transcript from two FWTAO witnesses. (Tr. Vol. 74, at pp. 9797-9802, 9914.) And, what makes an understanding of public elementary schools and their environment potentially important in an application of Professor Briskin's theories to the facts and issues with which I must deal are the impact of a far larger number of women than men elementary school teachers; the effect of employment equity as applied to positions of added responsibility at the elementary school levels that has resulted in significant increases of women at the principal and vice-principal levels; and the meaning, if any, in age differences between elementary school students and those at university.

Professor Briskin cited the work of Rebecca Coulter at the elementary level in a general way to demonstrate the application of her rationale. But, the matter was not pursued in direct examination. And, even accepting Professor Briskin as an expert would not allow me to take the mere citation of a single scholar, without more, as support for Professor Briskin's approach. (See, Tr. Vol. 74, at p. 9800.)

For the reasons stated above, I cannot accept Professor Briskin's comments as those

I think my major interest is in women organizing for change and the change-making process and, in particular, really trying to look at the gender-specific character, what it means to really look at women organizing. . . . (Tr. Vol 73, at p. 9631.)

Counsel for FWTAO asked that Professor Briskin be accepted as an expert in two areas: (a) women and unions in Canada; and (b) gendered teaching practices. Those supporting the complaints accepted Professor Briskin as an expert in the first area, but Counsel for the Complainants and OPSTF questioned her expertise in terms of gendered teaching practices at the elementary level. (Tr. Vol. 73, at p. 9652.)

Examination of Professor Briskin was allowed on that aspect which had been questioned. In the result, while recognizing that Professor Briskin had not researched the specific application of gendered teaching in elementary schools, I left it open to Counsel for FWTAO to demonstrate that her generalist's theories might have application to elementary schools. (Tr. Vol. 73, at p. 9662.)

That testimony was forthcoming. It related primarily to ¶20 of Prof. Briskin's Notice of Evidence where she stated:

Research now demonstrates the gendered character of classrooms, pedagogical practices, curricula and educational practices. This means that interactions between students and teachers, and between teachers also have a gendered component. For example, students have differing attitudes to female and male faculty. Women faculty, and feminist faculty in particular, describe challenges to their authority and greater

of an expert as to gendered teaching practices within elementary public schools.

I come now to the facts and the approach to those facts relied upon by Professor Briskin in reaching the conclusions set out in her Notice of Evidence. I am frank to say that some of the so-called examples relating to male dominance and the dynamics of female organization cause me a measure of concern. There are real questions, as Professor Briskin herself acknowledged, flowing from her lack of knowledge concerning the details of the examples used. There are also problems in terms of the conclusions drawn from generalizations relative to OTF, its mixed-gender Affiliates and FWTAO.

I have taken some of Professor Briskin's testimony to illustrate the bases for my concern in giving any substantial weight to the conclusions she has reached as an expert in the area of women and unions in Canada.

- Professor Briskin offered a number of specific examples relating to the experience of women in trade unions. One involved a survey done by the British Columbia Federation of Labour, using 1986 data, on the position of women in that province's trade unions. In the letter of transmittal to Professor Briskin, dated May 23, 1989, Anne Harvey, President of the Office and Technical Employees' Union, Local 378, Burnaby, B.C., enclosed only the *summary of the survey and the questionnaire used to obtain the data*. She did this, so it was stated in the letter, because the publication of the detailed results were felt to be "too sensitive" a matter. (Exhibit 632.) Nonetheless, the summary report was relied upon by Professor Briskin in ¶s 10-12 of her Notice of Evidence on matters dealing with proportional representation by

women in trade unions. (Exhibit No. 626, at pp. 4-5; see also Tr. Vol. 73, at pp. 9727-9733, 9780-9782.)

Yet, Professor Briskin cautioned that the study, or at least that which she obtained, has its limitations:

I think it important to say that this study has limits. . . . [The summary] is all they were prepared to give me. I think it is fair to say they haven't run statistical tests on whether or not, if you only have that many responses out of the pool of responses, about how reliable the data is. I think what we are getting here is some very clear absolute indications . . . because these are the actual numbers that responded. So I think the data is instructive. It is hard to say because I don't know either. . . . So it is true that this data is certainly limited. I think what is important about it is the scope of it. As limited as it is, it is probably the biggest study of this sort. . . . (Tr. Vol. 74, at pp. 9921-9922.

The survey does indeed have its limitations insofar as that which has been introduced in these proceedings. All that we have before us is the summary and the questionnaire. The normal academic means relative to validation are not in evidence. In the result, I cannot give any substantial weight to that portion of the survey received.

- In ¶16 of her Notice of Evidence, and in her testimony, Professor Briskin described one of the few examples of a so-called feminist union which had



set about with a degree of success the organization of branch bank clerks. The example related to the Service, Office and Retail Workers Union of Canada (SORWUC). My concern is the base upon which Professor Briskin draws her conclusions concerning SORWUC. There was no first-hand knowledge. Nor was there independent research except for an interview several years later with an organizer of SORWUC. Rather, Professor Briskin apparently drew her knowledge of the *facts relating to the organization effort from a book to which one or more of the organizers contributed*. (See, Tr. Vol. 74, at pp. 9931-9936; see also, Exhibit No. 639, at pp. 100-107, and note 24.)

- Women are under-represented in positions of responsibility within unions relative to their percentage of membership. However, this statement was qualified by Professor Briskin. It applied at the national level. There, using 1986 data, Professor Briskin said women made up 36.4 percent of all union members but accounted for only 17 percent of the central executive boards of unions. However, at the local and provincial levels, using 1985 data, women made up 47 percent of the members of the Canadian Union of Public Employees and constituted 40 percent of local presidents and 41 percent of delegates to the the union's national convention. (Notice of Evidence, ¶s 2-5, Exhibit No. 626, at pp. 1-3.)

I pause here to note the following:

(1) This is data Professor Briskin draws upon to support her conclusions relative to FWTAO.

(2) However, the facts are that OTF and its Affiliates are provincial, not national associations.

(3) There is no reliable data gathered by Professor Briskin relative to mixed-gender Affiliates concerning ratios of overall female membership to offices held. Professor Briskin did ask FWTAO to compile data relating to participation rates for women in teacher organizations for 1990-1991. (Exhibit No. 633.) While that information was received, it simply cannot be given any meaningful weight. It was gathered by FWTAO. Professor Briskin did not control or participate in the collection of that data. (Tr. Vol. 73, at pp. 9734-9737, see also, p. 9711.)

- In ¶9 of her Notice of Evidence, there is the following statement:

Not only do women in affirmative action positions experience difficulties, but all women in leadership positions in mixed sex unions encounter some difficulties. These include difficulties accessing information; problems juggling unpaid domestic work, paid work and union responsibilities; racism and feminist, lesbian and red-baiting are exacerbated for those women who actively pursue women's interests. (Exhibit 626, at p. 4.)

I am not sure of the point of Professor Briskin's comments. An overall reading of her testimony, coupled with her publications put into evidence would seem to indicate that the "difficulties" which she listed are systemic, that is, they arise out of an institutional structure and accordingly have

widespread impact. However, if that is an accurate description of what Professor Briskin intended in the paragraph quoted, then I must say that (1) there is no meaningful evidence presented through her testimony to support such conclusions; and (2) more particularly, there is no evidence through her research that such "difficulties" exist systemically in any OTF Affiliate.

- At a number of places in her Notice of Evidence and in her testimony, Professor Briskin describes what she sees as a situation of male dominance within unions, arising out of their structure. Women may be able to organize within mixed-gender unions but their success will not be an easy matter. Indeed, even when there is apparent success, it can often be on paper only. Without sure access to resources such success cannot be actualized. And, there is always the danger of women's groups within mixed-gender unions being marginalized, that is, of issues being seen as "women's issues" rather than issues bearing upon the membership as a whole.

Bearing this so-called reality in mind, Professor Briskin concludes that a "delicate balance" between engagement/disengagement; participation/separation is required on the part of women in a union setting. In that regard, the relationship of FWTAO to OTF to Professor Briskin epitomizes the right kind of "delicate balance." (See, Tr. Vol. 74, at pp. 9848-9849.)

I have great difficulty, assuming the truth of the factual conclusions stated by Professor Briskin, in applying them to OTF, its Affiliates, and particularly FWTAO. Professor Briskin is not able to help in this regard. Her knowledge

of FWTAO and OTF, as well as its other Affiliates, is limited in the extreme. It is limited, as I said before, to reading the transcripts of testimony of two FWTAO witnesses. Further, there are problems in relationship to the assumptions which Professor Briskin drew from that reading in coming to the conclusions which she stated. She assumed that FWTAO is the repository of women's issues within OTF. That is, FWTAO leads and others follow on all important issues. That simply is not the case on the facts. There is no doubt that FWTAO plays an important role in terms of women's issues. But, so do other Affiliates which are of mixed-gender. (See, Tr. Vol. 74, at pp.9871-9872.)

- Implicit in her testimony and explicit in her writings, Professor Briskin posits the need for compulsory membership in an organization such as FWTAO. She does this as part of what is needed for collective action. *But, the collective action, as I understand it, is directed toward social unionism as distinct from business unionism.* Professor Briskin stated:

Business unionism tends to focus on . . . wages and working conditions. It is very, very narrow. Social unionism sees the role of the union in dealing with broader kinds of issues that . . . have been seen as outside the mandate of unions. Equality of women has certainly been seen [as] outside the mandate for unions. . . .

. . . The business union has a conception of a union as a service to its members. So you elect people and they serve you as opposed to social unionism [which] sees the union as a social movement that really



wants participation from its members. So, I think . . . really built into what I've been saying is that link, really women's organizing has shifted, both in terms of the understanding of the mandate of unions and also how they activate their relations between leadership and membership on both those counts. I think there has been quite an interesting shift. (Tr. Vol. 74, at pp. 9951-9952.)

In my mind, there seemed some question as to whether Professor Briskin was proposing goals and an agenda reflective of her views as a socialist feminist, or whether she was articulating conclusions derived from facts that had necessary implications for FWTAO and other OTF Affiliates. There is little doubt that her conclusions set out above have their parallel in Professor Briskin's article published in the Autumn 1989 issue of 30 *Studies in Political Economy*, titled: *Socialist Feminism: From the Standpoint of Practice*, at p. 87, Exhibit 639.

In that article, Professor Briskin, identifying herself as a socialist feminist, contrasted that movement with radical feminism. Among other things, socialist feminism practices, said Professor Briskin, degrees of separation. That is, it moves along a continuum clear as to its goal, desirous of its achievement, and prepared to work within, for example, even a mixed-gender system rather than to be marginalized. That end goal, not unrelated to social unionism described above, is the "socialist feminist belief in the necessity for a fundamental social transformation that challenges not only gender relations but also the relations of class, race and sexual orientation [and] implies a commitment to the building of a mass heterogeneous political

movement that reaches far beyond even the widest boundaries of the women's movement."

Her evidence in these hearings, in my view, and with due respect, obfuscated the intent of the published article. Professor Briskin seemed to distance herself from the article, which, as I said, sets the same criteria which she proposed as applied to FWTAO. Professor Briskin said that the article was a discussion of a "conceptual model that talks about disengagement and marginalization." (Tr. Vol. 74, at p. 9873.) This is true. But the article is far more; it is, on a fair reading, proposals of means toward the achievement of the goals of socialist feminism.

It is not my place to be judgmental as to those goals. It is my place to ask whether the views put forward by an expert in a designated area should be given weight. My answer, for the reasons stated, is that those views should not be given weight.

There is a question, however, which should be noted: If a union were to become a *social union* as contrasted to a *business union*, to what extent does statutory membership, *per se*, take on greater significance? That is, assuming the definition of social unionism given above, membership would mean far more than merely the terms and conditions of employment. It would mean the union functioning in the community as a whole. (And by *community*, as I heard the evidence, this encompasses the world community.)

The summary and analysis given concerning the expert testimony presented as to the element of compulsion and its impact on individual dignitary interests within the meaning of the *Human Rights Code* has been lengthy. However, reviewing the testimony of each expert, I found that there was no reasonable foundation, based on the stated *expertise of that witness*, for altering my earlier finding that the Complainants in this matter did suffer injury to their dignitary interests within the meaning of the *Human Rights Code*. Indeed, especially as to one witness called by the Commission, Professor Epstein, I saw a theoretical basis that gave added support to the Complainants' contention of injury to their dignitary interests in the form of *symbolic segregation*. In making this finding, I also found it efficient to summarize the overall testimony of many of the experts and, in that regard, indicate its relevance to the case.

I will have more to say about discrimination and injury to dignitary interests in other sections of the decision and, more particularly, what I believe to be the primary issue on this phase of the case: Within the meaning of what is now section 14 of the *Human Rights Code*, is the action of OTF and FWTAO in terms of compelling membership on the basis of gender to be excused thereby requiring OPSTF to deny statutory membership to women public elementary school teachers?

### **3. The *Third Interim Decision* on the Question of Compulsion and Injury to Dignitary Interests: Its Meaning in Law**

Before proceeding further, so that there will be greater cohesion to this decision, relevant portions of the *Third Interim Decision* as to the meaning in law of *dignitary interest* and *injury to the same*, along with what has already been stated,

are set out and adopted as part of this Final Decision:

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Counsel opposing the complaints argued that there can be no violation of §5 of the *Code* without a finding in *law* of discrimination. The question is not purely one of fact. I agree. I accept the reasoning in *Saskatchewan Human Rights Commission and Michael Huck v. Canadian Odeon Theatres Limited*, 6 C.H.R.R. D/2682 (Saskatchewan Court of Appeal, 1985) where it was stated at ¶22172:

The word discrimination is not defined in the [Human Rights] Code. It is a word of some complexity and can have a number of meanings depending on the context in which it is used. In the field of human rights legislation, the term embraces a concept which is not necessarily the same as in other fields of endeavor. The meaning of the word *discrimination* or the phrase *to be discriminated against* in the context of this statute is not a word or a phrase which is capable of reduction to further simplicity. It is a word or a phrase which requires interpretation and in my opinion it is a question of law. Bayda C.J.S. in *Peters v. University Hospital Board*, [1983] 5 W.W.R. 193, dealing with the identical issue, stated at page 198:

The question whether the scope of the term *discrimination* used in §4(1) of the Act embraced those words and that statement of policy, or, put another way, whether those words and that statement were capable of constituting discrimination within the meaning of the Act, was a question of law.



Accordingly, the determination of whether there was discrimination involves a question of law. . . .

Before proceeding further with the criteria that go to make up a finding in law of discrimination, I think it necessary to deal with [another point] . . . developed by Mr. Forbes [Counsel for OTF]. He stated that there can be no finding of discrimination if the criteria going into the definition have been satisfied but the net injury is "trivial or insubstantial." (See, *Jones v. The Queen*, (1986) 2 S.C.R. 284, *per* Wilson, J. at p. 314, cited in *Edwards Books and Art v. The Queen*, (1986) 35 D.L.R. (4th) 1, at p. 35.) I accept the proposition. However, at this point in the proceedings, the Complainants have demonstrated a dignitary interest affected by compulsory statutory membership in FWTAO which precludes statutory membership in OPSTF solely because of their sex. In my view, injury to such an interest is not trivial or insubstantial. [Note: I have excised that portion of the Interim Decision relating to *Lavigne v. Ontario Public Service Workers*. That section is responsive to an important argument raised by those opposing the complaints, and it will be fully quoted and developed in the section of this decision relating to Labour Relations.]

I now will deal with my understanding of discrimination for purposes of the complaints. Those opposing the complaints state that differentiation alone is not sufficient for there to be discrimination on the basis of sex within the meaning of section 5 of the Code. Messrs. Forbes and McGee (Counsel for AEFO) discussed at some length a number of recent decisions of the Supreme Court of Canada which in their view require a showing of *actual or real injury* for there to be a finding of discrimination. (I will discuss these cases shortly.) Ms. Lennon (Counsel for FWTAO) carried that argument forward in terms of possible hurt and/or subjective

harm:

MS. LENNON: [P]ossible harm would have to be real rather than perceived. It would have to be grounded in real life and real facts. In other words it would have to be actually proved by evidence before you. . . .

. . .

THE CHAIRMAN: As a principle . . . could subjective feelings form a basis for discrimination?

MS. LENNON: In my submission subjective feelings of discrimination could not form the basis for a finding of discrimination, of actual discrimination under the Code, and it's a finding of actual discrimination that you have to make. That is not to say that dignitary interests are protected under the Code, but you still have to find *actual discrimination*.

THE CHAIRMAN: In order for those interests to come into play?

MS. LENNON: That is right. So, in the context of this legal principle of discrimination which requires a showing not just of distinction but also of *burden or prejudice*, what are the facts before you?

Again, regardless of the hurt or harm claimed, possible or subjective, it is the view

of Counsel opposing the complaints that real, measurable (and generally economic) effects of the differentiation must be shown for there to be discrimination in law.

I have considered carefully their arguments and, for purposes of the motions to dismiss, I must respectfully disagree. In the first instance, I must draw my interpretation of the law from the Code itself and, more particularly, section 5. In that regard, the language of the Code must be given a construction which will advance its broad purpose. In *Re Ontario Human Rights Commission and Simpson-Sears Ltd.*, (1985) 23 D.L.R.(4th) 321 McIntyre, J., for the Supreme Court of Canada, stated, having referred to the Preamble to the *Ontario Human Rights Code*:

There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The acceptable rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of of the action complained of which is significant. If it does in

fact cause discrimination; if its effect is to impose on one person or group of person obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. [*Id.*, at pp. 328-329.]

What then are the interests that the Code protects? After all, the broad reading given the Code is in relationship to designated interests. Those opposing the complaints, in my view, have couched the language of protection largely in terms of economic interests: Unless the discriminatory act results in a real injury or a real threat to economic interests of the individual victim, there is no discrimination.

In that regard, reference was made to several recent decisions of the Supreme Court of Canada. I do not question these decisions, as such. However, I believe they have limited application to the facts of the complaints before me. Let me begin with *Andrews v. Law Society of British Columbia*, 91 N.R. 255 (1989). Andrews, a permanent resident of Canada and a British subject, was denied admission to the practice of law in British Columbia solely because he was not a Canadian citizen as required by that province's *Barristers and Solicitors Act*. Andrews sought a declaration that that portion of the Act violated the equality provisions of section 15 of the *Charter of Rights and Freedoms*. A majority of the Court agreed with his claim, though it is interesting to note that McIntyre, J. dissented not on the basis of the principles that went into the decision, but rather on the application of those principles.

In my view, the underlying issue for the Court to determine was whether Andrews stood as a member of a *protected group within the meaning of section 15 of the*



*Charter*. The reason for this inquiry was that non-citizens were not an *enumerated group entitled to protection within the meaning of section 15*. It was necessary to ascertain the extent to which the group claiming protection was disadvantaged, that is, to gauge the effects of the challenged discrimination. Wilson, J. found that section 15 could be *expanded to include analogous groups and that, on the facts of the case, non-citizens were entitled to protection*. She stated:

I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is a subject of challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or re-enforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

It is also true, however, that Wilson, J. referred to the dissent of McIntyre, J. with which she said there was agreement in principle. Counsel for those opposing the complaints cited Justice McIntyre's opinion for the proposition that for individuals to be in a protected group, *enumerated or otherwise*, there first had to be a demonstrated adverse economic effect. McIntyre, J. explained different approaches necessary to make a finding of discrimination. In an already lengthy opinion, I do not think it necessary to detail the approaches he rejected. Rather, I will focus on what he found acceptable:

However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection accorded by the law but, in addition, must show that the legislative impact of the law is discriminatory.

Where discrimination is found a breach of s. 15(1) has occurred and - where s. 15(2) is not applicable - any justification, any consideration of the reasonableness of the enactment; *indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.* [Emphasis added.]

As I read the statement of Justice McIntyre, he does indeed require a showing of effect whether the grounds are enumerated or analogous for there to be a threshold

finding in law of discrimination. What he meant by *effect*, however, is different from the position urged by those opposing the complaints:

(1) Nothing said by McIntyre, J. foreclosed a finding of the requisite effect by recognizing the impact of the questioned practices on a complainant's dignitary interests. (These are interests which, I believe, Counsel opposing the complaints probably would characterize as subjective.) I have made it clear, based on the evidence thus far presented, that it is the dignitary interests of the Complainants which are affected.

(2) McIntyre, J. emphasized in the portion quoted above that the effect-qualification was needed to weed out "the obviously trivial and vexatious claim." Implicit in this was the need for the Court to determine that the interest affected was real. Once this had been done, then, assuming the non-application of section 15(2), the justification for the *prima facie* discriminatory act would be tested under section 1 of the *Charter*. Again, as applied to the facts in the matter before me, for reasons already given, based on the record to date, the claims are not trivial or vexatious.

Three months after *Andrews*, on May 4, 1989, the Supreme Court of Canada handed down three decisions, all of which related to the definition of discrimination within the meaning of section 15 of the *Charter*. Each of the decisions was cited by Counsel opposing the complaints in support of their position that, in addition to an enumerated subject, there must be a demonstrated objective effect for the act to be considered discriminatory.

I will deal with the three decisions. In my view, none of them diminishes the

construction that I have put on Justice McIntyre's definition of discrimination. I mention Justice McIntyre's definition of discrimination because each of the three decisions cites that definition with approval. The first decision to be discussed is *Turpin v. The Queen* where the reasons of the Court were provided by Wilson, J. The other two decisions were *Brooks v. Canada Safeway Limited* and *Janzen v. Platy Enterprises Ltd.* The reasons of the Court were given by Chief Justice Dickson.

In *Turpin*, one issue before the Court was whether sections 429 and 430 of the *Criminal Code*, as they read in May 1985, denied the equality provisions of section 15 of the *Charter*. In Ontario, in 1985, a jury trial was required in murder cases. However, in Alberta, a jury trial could be waived. For our purposes, it is enough to say that the Court found that one of the enumerated basic equality rights of section 15 had been violated with the result that there was a denial of equality before the law. The Appellants were treated more harshly in Ontario than those charged facing the same offence in Alberta, who had the opportunity to be tried by a judge alone, if they deemed this to be of advantage.

This finding was not enough to establish a violation of section 15. The Court had to move to the next step and determine whether the denial resulted in discrimination. "The internal qualification in s. 15 that the differential treatment be 'without discrimination' is determinative of whether or not there has been a violation of the section [15]. It is only when one of the four equality rights has been denied with discrimination that the values protected by s. 15 are threatened and the court's legitimate role as the protector of such values comes into play."

In effect, the appellants sought to be defined as a group discriminated against. In that



regard, they were in exactly the same position as all other persons charged with the offences in Canada with the exception of Alberta. There alone was the right afforded to waive a jury trial. Wilson, J. cited and quoted from McIntyre, J.'s opinion in *Andrews*: It is necessary to identify the personal characteristics of the individual or group resulting in a distinction. Then it is necessary to define the effect of such distinction in the sense of imposed burdens, obligations or disadvantages.

Wilson, J. then stated: "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. . . . A finding that there is discrimination will, I think, *in most but perhaps not all cases*, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged." The Court declined to find the requisite discrimination for an infringement of section 15.

The analysis required, said Wilson, J., looks to categorization - for purposes of section 15 - as an analytic tool used to determine whether the interest advanced is one intended to be protected by the *Charter*. The interest sought to be protected by the appellants in *Turpin* was not one expressly recognized by section 15 (enumerated). A broader search was undertaken by the Court to find whether the interest claim fell into an analogous group, a search in principle similar to that undertaken in *Andrews*.

Sometimes, however, Wilson J. indicated, that search might be unnecessary. My suggestion is that the search might be unnecessary where the group and the interest

affected have been clearly defined by legislation. To a considerable extent, this is precisely what has been done in the Ontario *Human Rights Code*. Section 5 of the Code specifically identifies the interest, which for our purposes is the right of every person to equal treatment with respect to membership in a trade union or occupational association without discrimination because of sex. The interest affected is defined by public policy through legislation. Interpretation of section 5 requires that the interest affected not be trivial or frivolous.

The Code provides a means for defining or measuring the effects of factual discrimination. One such measure for which damages can be provided is injury to the dignitary interests of the individual. This is no secondary subject to which damages attach after so-called objective injury has been proved. The preamble to the Code which the Supreme Court of Canada through the opinion of McIntyre, J. fully quoted in defining the nature and purpose of the legislation in *Simpson-Sears Ltd.* places dignitary interests in a primary position:

Whereas recognition of the *inherent dignity* and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is the *public policy in Ontario that every person is free and equal in dignity and rights* without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin. . . .

I have found as a fact, on the basis of the record to date, that such injury occurred. Using the standards set by Wilson, J. and McIntyre, J., I believe the requisites for a finding of discrimination in law have been satisfied in the context of the motions to dismiss.

I noted that two other decisions were handed down by the Supreme Court of Canada on the same day as *Turpin*. Chief Justice Dickson gave the reasons for the Court in each instance. At issue in the two cases was the application not of the *Charter* but the *Human Rights Act of Manitoba*. In *Brooks v. Canada Safeway Limited*, not reported at the time of this decision, the question was whether different treatment under a company health plan for employees unable to work because of their pregnancy as contrasted to those on sick leave constituted sex discrimination under the provincial *Human Rights Act*.

The Court treated with the question of discrimination first; then, having found discrimination on the basis of pregnancy, it asked whether this was a finding of sex discrimination. The answer to both questions was affirmative. In reaching these conclusions, the Chief Justice expressly gave the *Human Rights Act* a wide reading that would carry forward its underlying purpose of equality. He cited and quoted from *Simpson-Sears Ltd.*

Once again, as to the definition of discrimination, the Court turned to the opinion of McIntyre, J. in *Andrews*. The Chief Justice rejected the company argument of classifying pregnancy as a disability rather than an illness, and therefore not eligible for health plan benefits. He looked to the purpose of the health plan and found that it should encompass pregnancy:

The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery - which sort of comparison the respondent's argument implicitly makes - is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context, pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence.

It is not without significance that the Chief Justice gave this construction to the health plan, that is, the more generic scope of health-related reasons, because to do so would forward one of the purposes of anti-discrimination legislation:

This purpose . . . is the removal of unfair disadvantages which have been imposed on individuals or groups in society.



Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose.

Effect may be a necessary part for a finding in law of discrimination. However, as was made clear in *Brooks*, such a finding takes its meaning and thrust from the purposes which the anti-discrimination legislation (i.e. the *Human Rights Code*) is designed to further. As I stated before, one of the primary interests furthered by the Code is protection of an individual's dignity.

In *Janzen v. Platy Enterprises Ltd.*, not reported at the time of this decision, the Supreme Court of Canada, in my view, removed any doubt as to protection of dignitary interests. It was faced, in part, with the question under the Manitoba *Human Rights Act* as to whether sexual harassment in the work place was sex discrimination. At issue were the claims of two female servers in a restaurant that they were sexually harassed by the cook who held a position of some authority. The Chief Justice stated:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is as Adjudicator Shime observed in *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd.), and has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. *Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the work-place attacks the dignity and self-respect of the victim both as an employee and as a human being.*

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#### 4. Defence to *Discrimination* Under the Ontario *Human Rights Code*

Under this heading, at this point in the decision, I am only concerned with the impact of the *Charter* especially on what I believe to be the primary issue here, namely, whether FWTAO qualifies as a *special program* within the meaning of section 14 of the *Human Rights Code*.

Specifically, I think it important to comment upon and place in context some rather broad submissions of Counsel for OPSTF and the Complainants concerning the *Charter*. Early in his submissions in final argument in this matter Counsel for OPSTF and the Complainants stated:

If I can indicate some general structure to the argument, we are going to begin by saying that the *Charter* is there throughout this process: We can't forget about this because we're under the [Human Rights] Code. Primarily, you're exercising your duties under the Code, but, like any statutory authority you are bound by the *Charter* and you have to keep your eye on it.

And so, for the moment, I am trying to indicate to you that the Supreme Court of Canada, in a very recent decision, has spoken about *freedom of association, freedom from compelled association*, and said it is important for individuals and their self-actualization and to the process of democracy itself, and you can't forget that. And we simply want to plant that seed in your mind now so that, as we go through the case, you will always remember that the Supreme Court has said

freedom of association is a fundamental value and must be protected.  
(Tr. Vol. 124, at p. 16,460.)

The case referred to in the quotation is *Lavigne v. Ontario Public Service Employees Union*, (1991) 2 S.C.R. 211. In effect, I was told that the entirety of the *Charter* is binding upon me because any action that I might take by way of an order must be seen as government action. Those substantive sections with specific application, while including section 15, also encompassed sections 2(b) and 2(d) of the *Charter*.

Counsel for OECTA argued that it was inappropriate for me to consider such assertions. This case had never, as such, been presented by the Commission or others in support of the complaints as one involving either proof or judgment under the *Charter*. If such had occurred, assuming that jurisdiction would continue in a Board of Inquiry, Counsel for OECTA stressed that it, along with others opposing the complaints, were denied the opportunity to present evidence which might have justified any *Charter* violation within the meaning of section 1 of the *Charter*.

There can be no question that while By-Law 1 as enacted by OTF is private action, the resulting application of that by-law through the filter of the *Human Rights Code*, and any order flowing from this Board of Inquiry surely is government action and, accordingly, is subject to *Charter* scrutiny. In that regard, it is possible that a final order from this Board of Inquiry might not meet the dictates of the *Charter*. If that were so, then a court on review undoubtedly would strike or modify the action taken by the Board of Inquiry. (See, *Apsit v. Manitoba Human Rights Commission*



(1985), 23 D.L.R. (4th) 277 (Man. Q.B.), additional reasons at (1988), 9 C.H.R.R. D/4457 (Man. Q.B., reversed in part, (1988), 10 C.H.R.R. D/5633 (Man. C.A.).)

Still, as I have stated as this matter proceeded in hearings over several years, it was not the *Charter* but the *Human Rights Code* that formed the context for the development of relevant issues. The parties did not, as such, argue violations of sections 2(b), 2(d) or 15(1) of the *Charter* before the Board of Inquiry. And, if they had, as I said, there would be some real question concerning an *ab initio* right for me to hear such claims. The parties fully understand that the Board of Inquiry is a statutory body; it is not a court of original jurisdiction.

Accordingly, to the extent that Counsel for OPSTF and the Complainants take the position that I must hear the complaints in this matter in terms of *Charter* violations, I decline to do so.

Yet, having said this, I do accept that there is a *Charter* role for the Board of Inquiry in this case. In my view, it comes into play in terms of interpretation of issues arising under the *Human Rights Code*, especially where those issues involve matters of imprecise discretion. *Slaight Communications Inc. v. Davidson*, (1989) 1 S.C.R. 1038 may be of some help. It involved a decision by an appointed adjudicator under the *Canada Labour Code* on a claim of unjust dismissal of an employee by a private employer. That portion of the adjudicator's decision which came under *Charter* review concerned limits on what the employer could say in an employment reference to prospective employers following the termination of employment. It seems clear from the Court's restatement of the adjudicator's decision that there was no expressed development of *Charter* issues. But, there was no question that the



*Charter* applied. And, there was no question that its application was used first to fix upon the interpretation to be given the imprecise discretion granted by the *Canada Labour Code* to the adjudicator in fashioning remedies. Lamer, J., as he then was, stated at pp. 1077-1078:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter* unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force and effect. *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.* Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*. . . .

I believe I must follow the path marked in *Slaight Communications Incorporated, supra*. Where statute or cases bestow a broad but somewhat imprecise discretion on me as a Board of Inquiry, I must be sensitive to the jurisprudence emanating from the *Charter*. This proposition is not new to counsel. Throughout these proceedings on issues ranging from the definition of discrimination to that of dignitary interests, the parties have freely used *Charter* cases to argue their positions. And, especially in the *Third Interim Decision*, those cases were fully considered. That method of analysis will not change.

However, in this decision, there is in my view a need to comment on two areas where argument seemed to have been made that *Charter jurisprudence* could have some more particularized application: (1) There was reference to and extended argument relating to *Lavigne v. Ontario Public Service Employees Union*, (1991) 2 S.C.R. 211. I will deal with those comments under that section of this decision concerning labour relations. (2) Argument was made by Counsel for OPSTF and the Complainants that the *Charter* had application to any analysis as to the special program defence of section 14 of the *Human Rights Code*:

But when [the Complainants] say they want to join OPSTF, they're told, "... You can't." The reason is "You're a woman." And when they are told, "You're a woman," it leads to yet another *Charter* breach and that is a breach of section 15(1) [of the *Charter*]. Now section 15(1), ... [has] two exceptions that can be relied upon: [sections] 15(2) and ... 1.

... We simply put to you the *Charter* at the outset to make the point that in carrying out your duties, your statutory mandate to interpret



section 14 and to render a decision on these complaints . . . you must remain cognizant of the *Charter*.

....

The bottom line [is] . . . that section 14 [of the *Human Rights Code*] can't do more than what is permitted by the *Charter*. If section 14 said, "In order to overcome the disadvantages that women experience, where a board so orders, an organization can compel all women to be members." If it said that, we would argue [that] it's obviously in breach of [section 15] 2 and must be justified under section 1 [of the *Charter*]. (Tr. Vol. 124, at pp. 16464-16465.)

As I said before, *Charter* jurisprudence may play an interpretive role in an analysis of whether a given plan qualifies for section 14 treatment. But, I must emphasize here that my responsibility as a statutory tribunal *in the first instance* is to look to the law I am called upon to interpret and apply. The *Human Rights Code* is no ordinary law; it is special legislation which the Supreme Court of Canada has characterized as *quasi-constitutional*. Built into that legislation is flexibility and means to achieve its broad purposes. In this regard, I note again the comments of McIntyre, J., speaking for the Court in *Ontario Human Rights Decision and O'Malley v. Simpson Sears Ltd.*, (1985) 2 S.C.R. 536, at 546-547. (See, pp. 115-116, *supra*.)

For the reasons stated, in any analysis as to whether FWTAO as an organization qualifies for section 14 treatment as a special program, I will look first to the Code itself, its broad purposes and the place of section 14 in fulfilling those purposes. It

may be that there is an interpretive role for the *Charter* in such an analysis. But, in my view, in terms of my role as a statutory tribunal, bearing in mind the evidence constituting the record in these lengthy proceedings, and more particularly, the *absence of substantive Charter evidence going either to section 15(2) or section 1 of the Charter*, my focus will be, as I indicated, on the Code itself.

### **C. Burden of Proof**

In the *Second Interim Decision* in this matter, there was extended discussion concerning the question of onus or burden of proof, especially as it relates to the qualification of a Special Program within the meaning of what is now section 14 of the *Human Rights Code*. See, 11 C.H.R.R. D/104. At that time, I indicated that the opinions expressed under this head would remain unless there were cogent arguments or evidence in the hearings to follow which would persuade me otherwise.

In the final argument, Counsel for FWTAO repeated and enlarged upon the position they had taken in the proceedings leading to the *Second Interim Decision*. Essentially, I was told that section 14 should be read as part of what must be proved to make out a violation of the *Human Rights Code*. It is not a section, so it was stated, which constitutes an exception to that which would otherwise be a violation of the Code. Further, the view that the parties to the program are in the best position to know the facts ought not apply. Under section 14, the Human Rights Commission has the power to initiate investigations and to pass upon any section 14 program. The government with its far greater resources, coupled with its expertise, it was argued, is better placed to know and approve section 14 programs.

In the result, I disagree with the position taken by Counsel for FWTAO. My rationale is rooted in the purpose of the *Human Rights Code*, a plain reading of that Code, and the facts of this case. Much of that analysis has been set out in the *Second Interim Decision*, the relevant portions of which are quoted below. But before repeating that portion of the decision, I think it useful to state what I believe to be some obvious points: (1) One would not reach a section 14 question in this matter without having first established at least a *prima facie* violation of Part 1 of the Code. (2) The reality is that FWTAO never expressly approached the Human Rights Commission for approval of the organization as a section 14 program. And, bearing in mind the unique nature of the OTF and its constituent members, it is clear that they far more than the Human Rights Commission know the facts incident to what will or will not constitute the FWTAO as a special program. Indeed, time and again, the parties and the Intervenors reminded me in these complex and lengthy proceedings just how much there was to learn about their nature. Having said this, I now set out that portion of the *Second Interim Decision* which, I believe, continues to apply with the result that the burden of proving the existence and application of a section 14 program rests with OTF and, more realistically, FWTAO:

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#### Second Interim Decision (11 C.H.R.R. D/106-109)

Substantial issues were raised that centred around onus, [and] the role of [then] section 13 of the *Human Rights Code*, . . . Commission Counsel argued that to establish a *prima facie* case, she was required to do the following:

The *prima facie* case goes first. As part of its *prima facie* case the Commission will call the Complainants to establish the facts that are in the complaint, that is, that they applied for membership in the OPSTF and were denied membership, and that the general structure of OTF prevents them from full [statutory] membership in OPSTF. Evidence will also be called with respect to the general organization of OTF, although we will make attempts to try to get an agreed statement of facts with respect to these matters.

If we cannot do that, we will lead the evidence of how OTF operates, and I guess there will be an historical component to that, how it was set up and so on. We will also, as I have already indicated, call OPSTF to clarify for the record their involvement in the complaints, and also their position with respect to the Complainants' allegations.

Once we have established that the Complainants were denied membership or full membership in OPSTF, that, in my submission, is all of the evidence necessary to establish a *prima facie* case of a contravention of the Code. If no defences were raised at all, that would be sufficient to justify an order from this Board.

All Counsel opposing the complaints take strong exception to this. They argue:

(1) Those supporting the complaints would be splitting their case. It is clear that section 14 (formerly section 13) of the *Human Rights Code* concerning special programs for disadvantaged persons to achieve equal opportunity will form a vital



part of the case. And, in this regard, expert evidence will be called. Those supporting the complaints would be in the position of being able to cross-examine one set of experts, and then to mount experts of their own with no corresponding right on the other side to call reply evidence. Mr. Forbes, Counsel for the OTF, stated:

[I]f the plaintiffs have the plan of dumping enough evidence or adducing sufficient evidence to raise a *prima facie* case with the idea in mind of calling the substance of their evidence after hearing the evidence of the defendants, then . . . I wish to advise them at this time that we will be taking the position that that type of evidence in reply, which ought to have been subject to your ruling, adduced as part of the plaintiffs' case, will not be admissible at that time.

So I would ask my friends . . . to take into consideration, when assuming their obligations with respect to a *prima facie* case, so that we do not find ourselves regretfully, after a number of months and days, in an argument about whether someone has split his case. In my submission, it is the obligation of the plaintiffs to adduce all of their evidence in support of their position and not to wait until after the defence, which they know is coming, is adduced, and then to call the evidence in reply.

(2) In any event, those opposing the complaints take the further position that a necessary part of the complaints themselves is section 14. Putting it somewhat differently, Ms. Lennon, Counsel for FWTAO, stated:

We do not see section [14] as being an exception to the general non-discrimination provisions but as being a statutory direction as to how to interpret what really is discrimination and what really is equality. . . . In that sense, and I think this submission is supported by the [Human Rights] Code, we do not see section [14] as functioning as a defence in the same way that reasonable accommodation may be a defence.

Section [14] simply makes the categoric statement that a right under Part I is not infringed by the implementation of a special program designed to [relieve] hardship or economic disadvantage. . . . We . . . take the position that in a case of this nature, section [14] is, indeed, part of the Commission and the Complainants' cases in chief. There are substantial structural differences between the function of an affirmative action program under section [14] and a reasonable accommodation defence under section 10, and particularly under subsection 10(2).

Mr. Cavalluzzo, Counsel for the OECTA, endorsed Ms. Lennon's argument and he went one step further: He stated that as a matter of discretion in terms of an expedited hearing process, the Commission should be required to set out what it will prove, including any expert evidence, in relationship to section 14. Mr. Cavalluzzo stated:

It seems to me that the *prima facie* case that must be established must take into account section [14]. So the Commission with . . . the full

resources of the state behind it, should come forward with the adjudicated facts . . . [and] at the same time its expert evidence regarding that very crucial issue in section [14] which, . . . is not new to the Commission as far as this particular case is concerned. . . .

That, in my view, apart from the . . . interpretation of the Code is also the most expeditious way to proceed. Otherwise we are going to have a true tennis game here, where team two [those opposing the complaints] will be replying to the rebuttal of team one [those in support of the complaints].

Commission Counsel clearly stated that she understands much of the defence to the complaints is section 14-related. She argued, however, that her approach was designed to avoid case-splitting:

Now section [14] will involve showing, first of all, that there is a special program in place; secondly, that the special program was designed to assist a disadvantaged group. . . . Thirdly, they will have to establish that the group being protected actually is a disadvantaged group. Those are the elements of section [14].

I would expect that there will be some straightforward factual evidence called with respect to the section [14] defence. As Mr. Forbes [Counsel for OTF] stated, I would expect that there will be some historical evidence, and I would expect that there will be some expert evidence in the nature of experts on education, perhaps union-

organizing experts, and perhaps sociological experts on feminist theory.

As I have said before, I am speculating on what the defences will be. . . . Our submission will be that, once that evidence is in, we will be in a position to know what we need to put in . . . to rebut that.

I will have the right, of course, to cross-examine those witnesses. It may be the case that, having heard their evidence, and having cross-examined their witnesses, we will not be calling any expert evidence at all. It may be the case that the expert evidence will not be particularly contentious, so that a decision can be made by simply waiting. I do not know that now. What we are saying is that we cannot and should not be required to call evidence . . . anticipating what the section [14] defence will be.

Now my friends have said I am trying to split my case. In fact, what I am trying to do is to prevent that from happening. If I guess at what their section [14] defence is going to be by looking at the affidavit material that was filed in the court, and I anticipate their defence . . . and call experts or other witnesses to rebut in advance their evidence before it is presented, and then, when the respondents present their section [14] case and I find that it has a twist that I had not anticipated, I am then in the position where I must recall witnesses that I have already been through.

That is splitting the case. I am calling somebody at the beginning to



membership in occupational associations because of their sex. . . . Once we have done so, we close our case at our peril. You may be faced at that point with an application to dismiss the complaints in that they have not been established. At that point, we will rely on the decision of the Supreme Court of Canada in the *Borough of Etobicoke case* [Ed. which will be discussed shortly]. . . .

That makes it clear that, once we have proved exclusion from an occupational association because of sex, the complainants will be entitled to relief in the absence of justification. So, if the respondents at that point decline to call evidence . . . they do so at their own peril. At that point, it would seem to us that the law is clear, the *Etobicoke Rule* is clear, and so we anticipate that they would call evidence. When they have closed their case, it would then be open to us [those supporting the complaints] . . . to argue that they have not established a defence, and we can choose to call evidence in reply or not. . . .

So at further points in this hearing there will be a requirement for a ruling on a particular motion based on the evidence that is in the record at that point. A ruling at this point would be abstract and helpful but is, in our view, unnecessary.

I quite agree with the comments of Mr. Juriansz. It is not necessary for me to rule at this point on the issues of onus, the role and application of section 14, and the presentation of expert evidence. Such a ruling would be anticipatory. The facts are not before me and, while those opposing the complaints have indicated that much

give some of the evidence and then, in response to what I have heard, I call him again to give some more. . . . I should not be permitted to do that. . . .

My friends have suggested that what I am doing is depriving them of a right to reply. I am not. Once the onus shifts, so does the order of counsel. When the onus shifts over to the respondents to establish their defence, they call in evidence [that] which they say will establish that defence on a balance of probabilities. I have a responsibility to rebut it. The onus shifts to me to do so. If I raise matters that they had not anticipated or could not have covered in their case in chief, then they have the opportunity to ask you for the right to call reply evidence. Since they have the primary onus, they ought to have that right of reply, in the appropriate case, if it is truly evidence that they could not have anticipated.

While Mr. Juriansz (Counsel for the Complainants and OPSTF) agreed with the comments of Commission Counsel, he emphasized that the issue of onus need not be resolved at this point in the proceedings. Indeed, to do so would be for the Board of Inquiry to make an "abstract ruling." In the result, those involved in this proceeding as to the matters of onus, the role and application of section 14, and matters of proof relating to expert evidence act at their peril. This is a position with which Mr. Green, Counsel for the OSSTF and Mr. Forbes for the OTF, both agree. Mr. Juriansz stated:

We propose to prove that the complainants were excluded from full

of their evidence is known to the Commission, the reality is that that evidence has not been produced in this proceeding. Moreover, there is absolutely nothing preventing those opposing the complaints from eliminating or modifying what they referred to as the affidavit evidence before the court. Finally, any ruling might indeed be moot. As Commission Counsel indicated, it may well be that *no expert evidence will be called. The Commission and those supporting the complaints simply may be satisfied with what will be produced in cross-examination.*

Yet, having said this, I think it important for all counsel to have what must be characterized as *preliminary* thoughts only concerning the issues raised. They might be of some help in planning case presentation and more importantly ensuring that the hearing proceeds with expedition and that I receive all the relevant evidence necessary to make a decision on the merits. In this regard, I will divide my comments into three parts: (1) general rules relating to burden of proof; (2) the place of section 14 of the *Human Rights Code* in relationship to such rules; and (3) the need for a full opportunity for reply.

### **1. General Rules Relating to Burden of Proof**

In my view, the general rules relating to burden of proof as applied to the Ontario *Human Rights Code* have been laid down by the Supreme Court of Canada in *Ontario Human Rights Commission v. The Borough of Etobicoke*, 3 C.H.R.R. D/781 (1982). At paragraphs 6892-6893, the Court stated:

The case at bar involves complaints of discrimination in respect of employment on account of age. It was common ground that the

compulsory retirement at age sixty constituted a refusal to employ or continue to employ the complainants. While discrimination on the basis of age is in terms forbidden by s. 4 of the Code, in accordance with ss. (6) an employer may discriminate on that basis where age is a *bona fide* occupational qualification and requirement for the position or employment involved. Where such *bona fide* occupational qualification and requirement is shown, the employer is entitled to retire employees regardless of their individual capacities, provided only that they have attained the stated age. *It will be seen at once that under the Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception.*

Once a complaint has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, *the burden of which lies on him*, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities. [Emphasis added]

Such is the so-called rule in *Etobicoke*. There can be no question that this constitutes clear holding on the part of the Court. Its context was explained by the Court in *Re Ontario Human Rights Commission and Simpson-Sears Ltd.*, 23 D.L.R. (4th) 321



(1985), at pp. 337-338. The holding was applied not only in cases of direct discrimination, but also in cases of adverse effect discrimination. The Court stated:

To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all issues of the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a "tie-breaker" the concept of onus of proof. I agree then with the board of inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule, as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. Where adverse discrimination on the basis of creed is shown and the offending rule is rationally connected to the

performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in the position to show its absence. The onus will not be a heavy one in all cases. In some cases it may be established without evidence; for example, a requirement that all employees work on Saturday in a business which is open only on Saturdays, but once the *prima facie* proof of a discriminatory effect is made it will remain for the employer to show undue hardship if it [is] required to take more steps for its accommodation than he has done. In my view, the board of inquiry was in error in fixing the Commission with the burden of proof.

In my view, at this stage of the proceedings, it is enough to say that I will be guided by what the Supreme Court of Canada has stated in *Etobicoke* and in *Simpson-Sears*. In this regard, it cannot be said that the Commission "splits" its case when it proceeds to establish fully that which is required for a *prima facie* case. The fact that the Commission may have a reasonable basis for knowing what those opposing the complaints will argue in their defence is not the same thing as knowing fully and in fact what will be proved. To require the Commission to mount a reply in *anticipation of what will be proved by those opposing the complaints is not necessary to the proof of the Commission's prima facie case.*

## 2. The Place of Section 14 of the *Human Rights Code*

Those opposing the complaints, as noted, argued that section 14 of the *Human Rights Code* should be integrated into what the Commission must prove as part of its *prima facie* case. I summarized their views earlier in this Interim Decision.

At this point, it is enough to say that I find no basis either in law or in fact to treat with section 14 in a manner other than as a defence to proof of a *prima facie* case on the part of the Commission. I believe that Commission Counsel fully and effectively responded to such an argument:

Section [14] starts out with the provision, "A right under Part I is not infringed by the implementation of a special program. . . ." If you look at section 16 of the Code relating to handicap you will see that "A right of a person under this Act is not infringed for the reason only that the person is incapable of performing. . . ." Section 15 [of the Code provides] "A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship . . . is a requirement."

Section 23 of the Code, which is the reasonable and *bona fide* occupational qualification section that we dealt with in the *Borough of Etobicoke* case starts out, "The right under section 4 to equal treatment with respect to employment is not infringed where the discrimination is for reasons of certain provisions, and is a reasonable *bona fide* qualification because of the nature of the employment."

All of these provisions are structured the same way: "The Code is not violated," "The Code is not infringed where" - and then it is set out. In this case, "the Code is not infringed where," and there are those requirements for a special program under section [14].

My friend sought to distinguish section 10, which is the constructive discrimination section, but [it] is in fact structured the same way. It starts out a little differently because it says, "A right . . . is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons," but then goes on to say, "except where the requirement, qualification or factor is reasonable and *bona fide*."

So it is infringed except where it is reasonable and *bona fide*, which is exactly the same thing as saying it is not infringed where it is reasonable and *bona fide*. Structurally section [14] is in the same position as all of the other defences we have referred to. . . . There is no authority whatsoever, anywhere, for requiring the Commission to call as part of its *prima facie* case evidence that goes to rebut a defence. . . . The *prima facie* case is created if you show a violation of a right guaranteed by Part I [of the Code]. The Commission can rest its case there and an order will follow unless the respondent offers some defence. . . .

On the facts, there was no indication that the Commission either had approved or



had in some other way passed upon a special program within the meaning of section [14]. That is, there was no evidence presented to me which allowed for a finding at this point that in some way the Commission had constructively set certain criteria or impliedly approved of such criteria to the special program alluded to by those opposing the complaints.

I was told only that the Commission was aware of the special program and the rationale that went into its establishment and continuance. Such general statements are hardly enough to convert what the Code so clearly embodies as a defence into an element which the Commission is required to prove as part of its *prima facie* case.

In closing this section of the pre-hearing order, I think it important to emphasize that it is my intent to hear all of the relevant evidence necessary for an informed decision. If it should come to pass that in their reply those supporting the complaints raise unforeseen matters not covered in the defence in chief, there will be afforded to those opposing the complaints a limited further right of reply.

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#### **D. No Challenge to the Right of FWTAO to Exist as a Single-Sex Association**

At the start and at the close of these proceedings, FWTAO made strong representations that its right to exist as a single-sex association was under attack. According to FWTAO, there had not been compliance by the Ontario Human Rights Commission with section 8 of the *Statutory Powers Procedure Act* which provides:

Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

It was the view of Counsel for FWTAO that it stood as a party in these proceedings. Key elements of the attack against it, I was told, involved challenges to the good character and propriety of conduct of the organization and some of its leading officers. In that regard, I was reminded that FWTAO was never a part of the investigative proceedings leading to complaint. The organization did not participate in the informal procedures that came before complaint.

As I mentioned, FWTAO's concern as to whether its right to exist, as such, was challenged was raised at the start of these proceedings. At that time, in the clearest possible way, the question was put to the Commission, Counsel for the Complainants and OPSTF as to whether any part of the complaints, and in that regard intended relief, should those complaints be sustained in whole or in part, were directed toward the right of FWTAO to exist as a single-sex association. In the *Third Interim Decision*, 11 C.H.R.R. D/223, at D/234, ¶68, I confirmed the understanding of the Commission, and Counsel for the Complainants, and OPSTF:

I note . . . that neither the Complainants nor the Commission seek in any way in the complaints to alter the five-affiliate structure of the OTF. Ms. Logan-Smith stated:

My wish to have my statutory affiliate membership changed from FWTAO to OPSTF, and my reasons for actively seeking this change, are mine alone. I do not pretend to speak for anyone else, *and I am not trying to change the current five-affiliate structure of OTF.*

That understanding, namely that the complaints in no way are to be construed as an attack on the five-affiliate structure, and more specifically on the right of FWTAO to limit its membership, is embodied in an agreement by counsel made at the start of these proceedings. The thrust of these complaints before this Board of Inquiry goes to compulsory statutory membership by FWTAO which precludes consenting statutory membership in OPSTF and with it the allocation of statutory funds.

What I said in the *Third Interim Decision* continues to have effect. *There is no challenge to the right of FWTAO to exist as a single-sex association.* This ruling is founded on an understanding reached by counsel at the start of these proceedings. It is not, as such, based on an interpretation and application of section 8 of the *Statutory Powers Procedure Act*.

What has been stated, in itself, is an answer to the concern of FWTAO as to its right to exist as a single-sex association. However, implicit in that concern may be a question as to whether FWTAO or, for that matter, those Affiliates not named as parties in the complaints, were given a reasonable opportunity to know and respond to any charges that might have been made against them. (Here I use the word

*charges* in a non-legal sense.)

Because it was clear that, should the complaints succeed, they might impact on the affiliate structure of OTF, I took measures to ensure that each of the affiliates would be made aware of and given the full opportunity to respond to any material challenge directed at them. I did this in the context of my responsibility to control the hearing.

FWTAO, OECTA, OSSTF, and AEFO were afforded intervenor status of the kind which gave to them all of the rights as if they were parties to these proceedings. And, as the record amply demonstrates, each Affiliate made full use of the status given - including the right to request and examine documents and witnesses not otherwise made available before these hearings began. None of those participating in these proceedings could be said to be taken by surprise by any of the evidence. For example, a considerable amount of the evidence in the record - on all sides - involved expert testimony. Under rules that I set for the receipt of such evidence, all counsel were required to give advance notice of the identity of the experts and a summary of the evidence which was to be led. And, during the course of the expert testimony, documents referred to were produced (usually by agreement between counsel) with the opportunity for study before cross-examination.

In this setting, I can see no basis for further discussion concerning any perceived challenge to the right of FWTAO to exist as a single-sex association.



## E. A Distinction Between Evidence Going to Section 14 and the Right of FWTAO to Exist

However, there is a real difference between questioning whether FWTAO's program, as an organization satisfies the criteria for section 14 protection under the *Human Rights Code*, and a challenge going to the right of the organization to exist. Clearly, there can be no doubt that a central issue in this case is whether FWTAO has carried the burden of proof in demonstrating that it satisfies the statutory requirements of section 14. In that regard, it was open to the Commission, the Complainants, OPSTF and OSSTF to refute any claim by FWTAO to the protection of section 14. Nothing in the agreement between counsel at the start of these proceedings, as reflected in the *Third Interim Decision*, was intended to deny that right.

Nor can it be said that in countering FWTAO's claims to the protection of section 14 that in any way FWTAO was denied any of the rights afforded to parties under section 8 of the *Statutory Powers Procedure Act*, or for that matter under any other provision of that Act. The reason for this is, as I noted, the burden of proving entitlement to section 14 is on FWTAO. And, in that regard, the right to counter such arguments must be afforded to the Commission, the Complainants, OPSTF and OSSTF.

I make these points here because I sensed the possibility of misunderstanding as to that which was agreed at the start of these proceedings and the right to counter any section 14 submission.

***F. Ontario Human Rights Commission and Edwin Roberts v. The Queen in Right of Ontario and Ministry of Health, Ontario Court of Justice - General Division, Divisional Court, Dec. 18, 1990 (14 C.H.R.R. D/1)***

In their closing arguments, Counsel for FWTAO and AEFO urged as precedent binding upon me *Ontario Human Rights Commission and Edwin Roberts v. The Queen in Right of Ontario and Ministry of Health*, Ontario Court of Justice - General Division, Divisional Court, Dec. 18, 1990 (14 C.H.R.R. D/1). There the court reviewed and accepted a Board of Inquiry approval of a special program within the meaning of section 14 of the *Ontario Human Rights Code*. The Board of Inquiry decision is found at 10 C.H.R.R. D/6353. However, it is fair to say that the emphasis in the submissions of Counsel for FWTAO and AEFO was on the decision of the Board of Inquiry, and not that of the Court. Because of the apparent importance attached to the case, I think a full analysis is required.

At issue was the Assistive Devices Program of the Ontario Ministry of Health for persons with long-term disabilities. The complainant, aged 73, legally blind, sought financial help under the Assistive Devices Program to purchase a closed circuit television magnifier which would have permitted him to read. The request was denied solely because of his age.

At the time, the visual aid segment of the program was limited to those not older than 22. If he had qualified under the program the government would have contributed 75 percent to the purchase of the device. (Indeed, there had already been an extension of the program from its initial start limit of age 18. The responsible

minister indicated that "in time" the program would be further extended to eliminate all age restrictions. It is also fair to say that such action, that is, the elimination of age restrictions, was taken as to other aspects of the program.)

Counsel for FWTAO stated, and I agree, that the Board of Inquiry decision in *Roberts* was the first to interpret and apply section 14 (section 13 as it then was). In doing so, the Board of Inquiry set out a detailed analysis of, for the sake of a short-hand term, affirmative action in the context of Canadian anti-discrimination law with particular reference to section 14. I accept that that analysis is informative. I question, however, whether that analysis in its full statement is binding upon me as precedent.

Precedent in the sense of binding judgment derives from the decision of the Court on review. I accept the submission of Counsel for FWTAO who stated "... to the extent that the Divisional Court adopted [the rationale of the Board of Inquiry in *Roberts*], and unless and until that decision is set aside by the Court of Appeal it is, with respect, binding upon you."

It is important, therefore, to understand fully the decision of the Divisional Court. The opinion of the Court is brief and to the point. It consists of three paragraphs which I quote in full:

This appeal must be dismissed. We agree with the Board of Inquiry that the age restriction built into the Assistive Devices Program which appears to violate §1 of the Code is protected by §[14] of the Code.

Programs, such as that in issue in this case, will, by their very nature create differences in treatment on many and varied grounds. The only issue in this case is whether or not the program is a *special program* designed to relieve hardship or economic disadvantage. It is agreed that this program was developed and implemented to assist its beneficiaries to achieve greater equality of opportunity. While the constitutionality of §[14] was not challenged, the appellants submitted that the age criteria applied in the program removed the program from the protection of §[14].

In our view, the wording of §[14] is plain, clear and can admit of no doubt. It is not possible to read into that section the qualification suggested by the appellants when the legislature has not itself seen fit to impose such a limitation. Generally speaking, courts should not lightly second guess clear legislative judgments, particularly when dealing with programs designed to proceed to greater equality of opportunity for disadvantaged persons. In our view, the age limitation in the program is protected by §[14] and the appeal must be dismissed.

What then did the Court decide? There was agreement that the legislative scheme was a program, and that it was "developed and implemented in order to assist its beneficiaries to achieve greater equality of opportunity." The only issue from the Court's viewpoint was whether section [14] of the Code was to be read as eliminating all forms of age discrimination in order to qualify for a protected affirmative action program. There was, said the Court, nothing in section [14] itself to provide a basis for the position taken by the Commission. Moreover, by the very nature of the



questioned program, the Court noted, discrimination of the kind challenged is likely to occur. Such were the findings and reasoning of the Court. To the extent that they are relevant to the matters before me I am indeed bound by the Court's decision.

(I note that there was no examination of subsection 5 of section 14 which provides: "Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown." An effect of this provision is to *free the Crown to establish a special program not subject to review and modification by the Commission. Impliedly, it could be argued that this precludes all others from establishing a special program not subject to Commission review and modification.*)

However, as will become clear, in most important respects the matters before me are far different from those in *Roberts*.

This is not to deny a number of conclusions reached by the Board of Inquiry in *Roberts* that could have application to the issues facing me. It is only to say that those conclusions are not binding upon me to the extent that they were not adopted by the Divisional Court on review. For the sake of specificity, I will review and comment on the findings which, in my view, fall outside the ambit of the Court's opinion in *Roberts*:

- *Affirmative action and legislative intent* - The discussion of the Board of Inquiry concerning the legislative intent behind the enactment of then section 13 of the *Human Rights Code* was not necessary to the decision reached. The Court found section 13 of the Code plain on its face and the application of the Assistive Devices Program clear.

However, having said this, it may be useful to indicate the limited nature of the legislative history, as it was summarized by the Board of Inquiry. The summary of that legislative history consisted of three short paragraphs. The first quoted the predecessor of section 13. The second is a statement from the Minister of Labour in introducing the bill containing the language of then section 13. The entirety of that statement quoted by the Board of Inquiry was as follows:

Provision is made to exempt affirmative action plans or programs legitimately designed to benefit particular classes of persons. This is in response to the view expressed by many special interest groups that special programs to help their members achieve equal opportunity should be allowed to operate with the minimum of difficulty.

Exception is also made for government programs of similar intent, including tax legislation.

The third paragraph is a brief comparison made by the Board of Inquiry between the predecessor and the then newly enacted section 13.

Such was the sum total of the "legislative history" as given by the Board of Inquiry who then moved to a discussion of what she called the *Concept of Affirmative Action*. I mention this because that discussion should not be confused with what the Board of Inquiry had to say about the legislative history behind then section 13. Putting it somewhat differently, that legislative history in no way supports the rather sweeping conclusions

reached by the Board of Inquiry as to what would constitute a valid affirmative action program. That support, itself, is limited. It is the conclusion of the Board of Inquiry, herself, for example, when she wrote of the "mechanisms adopted to reduce disadvantage. This will be a process of trial and error, and we would do well to permit a wide diversity of programs and policies as we experiment in determining how best to alleviate the disparities." [See ¶45084 at D/6359.]

- "*Designed*" and *bona fide belief* - It is true, as Counsel for AEFO stated, that the Board of Inquiry interpreted the requirement of then section 13 concerning a program being *designed* to relieve against certain conditions as meaning only that there be a *bona fide intent* to do so. And, in the view of the Board of Inquiry, this was taken to mean a *subjective intent*. All that was required, according to the Board of Inquiry, was good faith. And, certainly there was no need to prove that the program would bring about the result promised.

The conclusions of the Board of Inquiry in that regard were hers alone. They were not part of the Court's findings or adoption by the Court of her rationale. It will suffice to say that the Court found that the Assistive Devices Program, by its very nature, brought the intended benefit for those who were targeted. There simply was no need for the Court to probe standards of intent for the purpose of determining the meaning of *designed*.

Moreover, I note that Counsel in the case before the Board of Inquiry "did not specifically address what was meant by the word *designed* in [then] section

13(1)." (See, ¶45158, at D/6372.) Rather, the Board of Inquiry reviewed commentaries of two writers, including Mr. Juriansz. Both argued for a meaning that would have included an element of objectivity. The Board of Inquiry rejected both submissions, and contented herself with an interpretation of a dictionary definition of the verb, *designed*, rather than the noun, *design*. From this base, the Board of Inquiry concluded that "the focus here [section 13(1) as it relates to *designed*] is on intention, rather than the actual achieving of a result. *The test required is a subjective one, and the focus is to separate bona fide motivations from colourable intentions.*" [Italics added.] It should be noted that Counsel were not afforded the opportunity to argue the approach taken by the Board of Inquiry.

In the absence of a plain-meaning application, such as that used by the Court in *Roberts*, I am not inclined to accept the conclusions reached by the Board of Inquiry on this aspect of the case.

- *Discrimination on the basis of handicap/reverse discrimination* - Counsel for both AEFO and FWTAO have noted and emphasized the Board of Inquiry's analysis of *Andrews v. Law Society of British Columbia* (1989) 56 D.L.R. (4th) 1 (S.C.C.). That analysis came in relation to a set of facts not raised in the complaint, but volunteered by the Board of Inquiry in what can only be described as a global approach to the case before her.

Under the heading of *Section 1 Analysis - A. Discrimination of "Handicap,"* the Board of Inquiry stated that "the Assistive Devices Program clearly extends services to disabled individuals that are not available to able-bodied



persons. *Could the Assistive Devices Program be challenged by an able-bodied complainant as 'discriminatory' and violating a right to equal treatment?"* It was in this specific context that *Andrews* was discussed.

That context simply had no relevance to the complaint before the Board of Inquiry. She was specifically charged with hearing the complaint of an individual who but for his age was otherwise qualified for the Assistive Devices program within the meaning of sections 1, 8 and 13 of the *Human Rights Code*. Comments by the Board of Inquiry concerning reverse discrimination and the meaning of discrimination as applied to able-bodied persons in relation to those disabled were not part of the case. And, I am loath to take generalized quotes from the opinions in *Andrews* and apply the gloss given by the Board of Inquiry.

- *Interpreting Section 14 of the Human Rights Code* - Counsel for FWTAO pointed to discussion and conclusions reached by the Board of Inquiry concerning the interpretation of then section 13. This was an issue raised in the hearing. Counsel for the Human Rights Commission argued for a narrow reading of section 13 apparently on the basis that its terms constitute a form of exception to the basic rights granted by the Code. In that regard, the Commission sought to have the Board of Inquiry assume an oversight function in the administration of the Assistive Devices Program to pinpoint excluded groups and compare relative disadvantages.

In response, as Counsel for FWTAO correctly stated, the Board of Inquiry both refused to read then section 13 narrowly and to assume the kind of oversight

function suggested by Commission Counsel. The Board of Inquiry took this position because in its view, based in no small measure on its reading of *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, (1985) 2 S.C.R. 536, bearing in mind that section 13 was remedial in nature, that section should be given the same interpretation as other Code provisions to advance "its broad purposes." The point is, however, that the discussion embarked on by the Board of Inquiry was not necessary to its decision. On review, the Court found that on a plain reading of section 13 the Assistive Devices Program fell within its ambit.

The generalized statements concerning how then section 13 should be interpreted, as set out by the Board of Inquiry, certainly have not risen to the level of precedent. Nor can it be said that there is a necessary nexus between what the Board of Inquiry concluded and brief extracts taken from the Supreme Court of Canada's decision in *Simpson-Sears*.

Though this statement will be repeated many times in different ways throughout this decision, it is my view that to give the specific provisions of the *Human Rights Code* at issue before me a purposive interpretation I must closely examine the factual context of this case. With respect, save for a five-paragraph summary of the facts at the start of its opinion, and two paragraphs toward the end of the decision, the Board of Inquiry in *Roberts* in a lengthy opinion does not *detail* either the *Assistive Devices Program* or its application.

For the reasons stated, I find that the Board of Inquiry decision in *Roberts* has

limited application to the facts with which I must deal.

**G. *Gene Keyes v. Pandora Publishing Association* (March 17, 1992, unreported), Board of Inquiry, Nova Scotia Human Rights Commission**

Counsel for FWTAO, as a second preliminary point in final argument, asked that the above-noted matter be considered as standing apart and being especially relevant to the case before me: "The reason I want you to look at this case at this point is because it is our submission that not far underneath the approach taken to this case by my friends supporting the complaint and their use of the term *segregation* is the proposition that a single-sex organization for women is, per se, discriminatory. The *Pandora* case puts that notion to rest, and it puts it to rest without the aid of an equivalent of section [of the *Ontario Human Rights Code*]. It does it through the use of *Charter* principles helpful in distinguishing between formal and substantive equality principles." (Tr., Vol. 130, at p. 17,174)

Except in the most general sense, I am hard pressed to see any special application of *Pandora*. The facts bear little relationship to the matter before me. *Pandora*, a feminist publication of limited circulation, as a matter of policy denied access by males to that portion of the publication dealing with letters to the Editor. In the result, applying *Charter* principles, the single-person Board of Inquiry said that while there surely was a difference in treatment between males and females as to access to the publication's segment, *Letters to the Editor*, it was not of the kind which should be treated as unlawful discrimination within Nova Scotia's human rights code.

Of assistance to the Board of Inquiry in reaching this conclusion was a lengthy recital of considerable expert evidence introduced by *Pandora*. Much of that evidence came from many of the same individuals who spoke as experts in the matter before me. And, in several respects, the evidence in substance appeared to be similar. (I do note, however, that neither the Human Rights Commission nor the complainant in *Pandora* introduced experts of their own, as was done by the parties and the intervenors in the OTF matter.)

For three reasons I think it inappropriate for there to be any further discussion of *Pandora*:

1. The Commission and others supporting the Complaint have stipulated that there is no intent to challenge FWTAO as a women-only organization. That stipulation was integrated into Interim Decisions in this matter, and has been made a part of this Final Decision. The stated rationale for FWTAO Counsel's discussion of *Pandora*, quoted above, was based on a challenge to FWTAO as a single-sex organization.
2. All those who have participated in these proceedings as parties or interveners, time and again, have emphasized the need for a contextual approach in making findings. I have agreed. This case, and the facts relating to it, are unique. The facts in *Pandora* simply bear but the slightest connection with those raised in this proceeding.
3. *Pandora* dealt with the denial to males of access to the *Letters to the Editor* column in a feminist publication. Here we are faced with compulsory



membership on the basis of gender in provincial teacher associations. Many of the experts who testified in *Pandora* are the same as those who testified here. Much of what they said might be the same. The application of what they said, the inferences to be drawn therefrom, and the interface of their testimony with other experts and other witnesses are entirely different matters.

Accordingly, for the reasons stated, I see no meaningful relevance of *Pandora* to the matter before me.

## Summary

This concludes Part I of the decision where I have dealt with a number of what might be called threshold issues. I have restated portions of the *Second* and *Third Interim Decisions* which I believe are essential to this decision. I have found that there continues to be a basis for finding that the Complainants have been discriminated against as a result of OTF By-Law 1 which in their case requires statutory membership in FWTAO on the basis of their sex thereby denying them the right to obtain statutory membership in OPSTF. I have found that denial to invade the dignitary interests of the Complainants. In this regard, I have reviewed and weighed the extended testimony of expert witnesses.

In making this finding, I have considered the meaning in law to be attributed to *discrimination* as well as invasion of one's dignitary interests. I have also weighed and considered expert evidence and those cases which have been cited as precedent. It is my view that the primary questions for determination in this phase of the case

are:

- Is FWTAO as an organization a special program within the meaning of section 14 of the *Human Rights Code*?
- To what extent, if any, does labour relations law, bearing in mind the facts of this case, impact on the findings made?
- If FWTAO is not a special program within the meaning of the Code, then what relief should be ordered?

## II

### A. Overview of Section 14 Issues and Approach

In this part of the decision, I will focus on the FWTAO claim that it may assert what I have found in Part I to be the defence of section 14 of the *Human Rights Code*, and that the defence is fully applicable to it. The full text of section 14 is as follows:

§14(1) - A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

(2) The Commission may,

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) if claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown. 1981, c. 53, §13.

There are certain threshold questions incident to a consideration of section 14, itself:

- Are women public elementary school teachers a “disadvantaged group” within the meaning of section 14?
- If they are a disadvantaged group, is FWTAO a “special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons



or groups to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I?

To answer these questions, based on the nature of FWTAO as an Affiliate and an ongoing organization, certain other questions must be posed:

(a) What is the constituency of FWTAO? Is the membership well-defined? Is it likely to change in the near future?

(b) To what extent has FWTAO defined its special program? With clear definition comes the opportunity for its members and the Human Rights Commission to evaluate. Without clear definition, there is the danger of a lack of accountability.

(c) Assume the special program is clear. Then the questions must be put:

(i) Is there leadership accountability to the membership?

(ii) Are there controls to prevent the majority from oppressing the rights of the minority?

(iii) Is there effective control by FWTAO to ensure compliance with its provincial policy (that is, the special program) on the part of its local WTA's?

Assume all the questions posed are answered in the affirmative. Does that end the

matter? Has the defence under section 14 been demonstrated? I think not. I believe section 14 can only be interposed as a defence if the restraints on basic individual rights otherwise protected under the *Human Rights Code* are *proportionate*. That is, *no more may be foreclosed of the individual rights granted under the Human Rights Code than are reasonably necessary to achieve the ends of section 14.*

Let me put the matter somewhat differently: Section 14, as I see it, is a limited defence to what might otherwise be violations of the Code's substantive provisions. It is a defence because, on the face of it, the special program is designed as an *alternative means for remedying the wrongs set out in the Code*. To read section 14 as permitting that which is forbidden by the Code's substantive provisions would be destructive of the broad purposes of that law. Here the issue of proportionality is directly related to the very question disputed in these complaints, namely, *compulsory membership on the basis of gender*. Thus, in my view, even if FWTAO were seen as constituting a special program within the meaning of section 14 of the *Human Rights Code*, there remains the issue as to *whether compulsory membership on the basis of gender is necessary to the operation of the program*. And, I note here that the burden of proving such necessity, based on the reasoning expressed in part I of this decision, rests with the party asserting it: FWTAO and OTF.

Relying upon *Roberts v. Ontario Ministry of Health, supra*, discussed in Part I of this decision, Counsel for FWTAO argued that there were two branches of proof needed to establish a section 14 program, the first of which was that women public elementary school teachers are a disadvantaged group, a matter which will be more fully developed in this segment of the decision. As to the second branch, Counsel for FWTAO stated:

¶829. It is further submitted that the evidence clearly establishes that the second branch of the test is met as well, in that the intent of the provisions of By-Law 1 of which the Complainants complain is an intent protected by all three sub-provisions of §13 [now §14]:

(i) the structure of the OTF By-Law is designed to reinforce the structure of OTF which protects the interests of disadvantaged groups;

(ii) the By-Law does and is designed to reflect the pattern of self-organization of teachers in the province; and

(iii) the organization chosen by the majority of women elementary teachers in Ontario is the FWTAO, an organization that in its founding and consistently throughout its history has been assisting women elementary teachers to achieve equal opportunity. (*3 Argument on Behalf of the FWTAO*, at p. 273.)

I believe that the questions I have raised are reflective of the assertions made by FWTAO to the claim of special program entitlement under section 14. It is the answer to these questions which will be probed in this section of the decision. I will not, as such, attempt any full statement as to the meaning of section 14 in the abstract. I will not do this because section 14, itself, is written in broad terms that invite a contextual analysis. And, this approach applies all the more so to FWTAO, an organization unique not only as to Canada.

This is not to deny a number of concerns, based on the language of section 14 itself,

as to whether FWTAO as an *organization* can claim the benefits derived from being a special program. Section 14 applies only to a *special program designed, among other things, to achieve equality on the part of disadvantaged groups*. It is a fair question to ask how a body corporate with *generalized responsibilities in relation to women public elementary school teachers can, itself, be deemed a special program*.

This requires putting the questioned mandatory assignment rule based on gender in the broader context of OTF, viewing FWTAO and the other Affiliates as organizations which, as we shall see, essentially govern OTF, and then viewing in a fairly sharp focus just what is covered and what is excluded in the use of the term, *equality-seeking organization*, which is how FWTAO describes itself.

## **B. Interpretive Concerns Under Section 14 of the *Human Rights Code***

Let me express my concerns as to whether section 14, on its face, can be used by FWTAO to establish what I see as a defence of a special program:

### *1. Can an Organization Be a Special Program?*

The position taken by the Commission, the Complainants and OPSTF is that an organization can never be a special program within the meaning of section 14. Their reasoning seems to go to the language of the provision itself as well as its relationship to section 18 of the Code.

(a) Section 14 expressly provides only for a *special program* to be exempt from the operation of Part I of the Code. It is to be assumed that the Legislature



intended to give the words used their ordinary meaning unless some contrary intent was expressed. *Program* is given this definition in the tenth edition of *Merriam Webster's Collegiate Dictionary*: "(2a) a brief usually printed outline of the order to be followed, of the features to be presented, and the persons to be participating (as in a public exercise or performance). (3) *a plan or system under which action may be taken toward a goal. . . .*"

(b) Note, too, that not only does *program* require a plan or system for the achievement of a goal, but the term is conditioned by the word, *special*. And, one definition of *special* is to be *readily distinguishable from others of the same category*.

(c) It may be that some or many of an organization's programs qualify as *special programs within the meaning of section 14 but that is not the same as saying that the organization, as such, is a special program*. In its written argument, Vol. 1, at p. 44, Complainants stated at ¶133:

An organization is subject to management control according to its governing structure. An organization's policies, operations and activities are subject to change according to the direction of its management. Recognizing an organization as a §14 special program would in effect approve in advance its future policies and activities without subjecting them to scrutiny. Approval of FWTAO as a section 14 program could be effective only so long as FWTAO made no change to policies, or activities. If FWTAO modified a policy, or replaced one activity with another, a new challenge would be possible requiring

another adjudication.

(d) The Code does draw lines as to exemptions related to plans and those directed toward *organizations*. Nowhere in §14 are the terms *associations* or *organizations* used. The term used in that section is *special program*. However, §18 of the Code is specifically directed toward *institutions* or *organizations*. That section provides:

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

In §18, the Legislature addressed itself to organizations of certain kinds and their *general goals*. Can it not be said, the Complainants ask, that by focusing on organizations as such in §18, the Legislature meant to exclude them from §14? Further, it can be argued, that even if the terms of §14 are to be read into §18 there is absolutely nothing in §18 which *compels membership*.

## 2. Must a Special Program Within the Meaning of §14 Be Reasonably Precise?

A special program must be capable of objective definition. How else can it be determined that the program fulfills the objectives of the Act by the elimination of the infringement of rights under Part I of the Code?

The capacity to make such a determination is implicitly required by subsections (2), (3), and (4) of section 14, so the argument goes.

On its face, subsection (2) gives the Human Rights Commission wide-ranging review powers over a special program. The Commission need not wait for one to apply for review. It can exercise its own initiative. (§2a). It has the power to declare by order that the program does not meet the standards of subsection (1). (§2d). Or, that subject to modifications, it satisfies the requirements of subsection (1). If all the Commission has before it is a declaration of good intention and a general policy statement from the applicant who proposes the special program, how is it possible for the Commission to fulfill its responsibilities under subsection (2)?

So, too, how is a person who is *aggrieved* by the making of such an order approving a plan able to articulate specific modifications for Commission consideration? Finally, how is the Commission to be able to *exercise its discretion in reviewing a special program if the objective contours of that program are not set out*? Recall that §2(a) allows the Commission to *inquire into a special program and, in the discretion of the Commission [it] may by order declare . . .*." One must assume sufficient specificity for the Commission to exercise discretion.

Such an interpretation tends to be reenforced by subsection (4) which removes any Crown special program from Commission review as to subsections 2(d) and 2(e). As I noted in Part I of this decision, in the *Roberts case, supra*, the Board of Inquiry had before it a Crown special program that

really was not subject to Commission review in terms of satisfying the requirements of subsection (1), or with modifications satisfying those requirements.

I have listed these concerns without ruling, as such, upon them. I think it more important in a case such as this for the facts of the case to be given full expression. Some might, as I have indicated, describe this approach as being contextual in nature. In the final analysis, however, the facts are enormously important. They go to define the program for which a defence is claimed to what would otherwise be violations of the Code. Further, we are dealing here with Affiliates, some of which were founded more than 70 years ago, and there is as an essential part of the organizational mix a federation, OTF, now entering its second half century of life.

And, we are dealing, too, with organizations that surely are affected with a public interest: There is the power to regulate and discipline licensed teachers, and there is the not insubstantial power in the OTF to recommend to government changes going to any aspect of the educational system of this province at the primary and secondary levels. In such a setting, I think it would be inappropriate to pass upon basic or substantive issues on what might appear to be narrow grounds though, as I said, this is not to say that such grounds are not present in this matter. It is better, however, in my view, that they find expression in the broader setting of the facts applicable to the parties in these proceedings.



### C. Need for a "Special Program" - Women Public Elementary Teachers as a Disadvantaged Group

Considerable evidence was led by FWTAO, especially through eleven expert witnesses, concerning women as a disadvantaged group in society as a whole. To some extent, this testimony has been summarized in Part I of this decision. In addition, and also noted in Part I, were more specific claims and evidence to support them of systemic discrimination against women public elementary teachers - an important element of which take the form of placing them outside the stream for positions of added responsibility [PAR] and thereby contributing significantly to a wage gap between what women public elementary teachers *actually earn* as against the actual wages of their male colleagues.

Such ongoing pervasive discrimination has resulted in entrenched inequality that even so-called affirmative action, equity employment programs cannot fully correct. The reasons lie not so much in anti-discrimination laws, but in ingrained behavioral, social constructs. Historically, I was told, women elementary school teachers saw themselves outside the PAR stream; their role related to teaching, not supervision, not school administration. And, men who dominated PAR positions certainly did not encourage a different attitude.

To effectively cope with such systemic discrimination, FWTAO argued that it has created a special program within the meaning of section 14 of the *Human Rights Code*. Precisely because it is an organization for and about women, it not only can focus on matters such as PAR issues, but it can provide a meaningful forum for its members to practically assert themselves, and see themselves in PAR positions.

Carrying that reasoning forward, FWTAO contends that its job can only meaningfully be done if all women public elementary school teachers - statutory members of OTF - are required to be members of FWTAO. This gives the Affiliate a solid financial base, a stable membership and, importantly, effectiveness *vis-a-vis* the other Affiliates.

All those supporting the complaints acknowledge that women do constitute a disadvantaged group in society. More relevant, however is their view of the *present* nature of such discrimination as applied to women public elementary school teachers. Here again there is acknowledgment by those supporting the complaints that women are under-represented in positions of added responsibility and that there is a wage gap - of a sort. And, by this qualification the meaning is that that under-representation is ending and the wage gap is narrowing. Referring to the Written Argument of the Complainants, Vol. 2, at Tabs 16-17, the Commission stated in its final argument, at pp. 12-13, ¶s 41-46:

41. There has been evidence of disadvantage in the employment context led with respect to the following areas: positions of added responsibility (PARS), the wage gap, and issues related to women's life cycle (e.g. calculation of seniority, maternity leave provisions, part-time employment.)

42. The Commission agrees that women are disadvantaged in PARS, suffer a wage gap, and are affected adversely by the life cycle issues outlined above.

43. The degree and changing nature of that disadvantage is discussed in the evidentiary analysis of the complainants at Tabs 16, 17.

44. As indicated above, the branch affiliates of FWTAO have chosen not to bargain separately on these or any issues. We must assume FWTAO has been satisfied with the collective bargaining process carried on jointly with OPSTF in these areas.

45. It is submitted that the evidence establishes that the other federations have been at least as successful in addressing these areas of disadvantage for their own female members. The Commission relies on the analysis of evidence of OSSTF on this issue.

...

46. The Commission agrees that the position of women in Canadian society and elsewhere is one of disadvantage.

OSSTF, for its part, stated the following in its Written Argument in Reply at p. 16:

26. Lest there be any doubt planted by the submissions of FWTAO, OSSTF starts from the uncontradicted evidence that systemic discrimination against women exists in society as a whole; that it exists within the educational system in Ontario; and that substantive equality has not been completely achieved within the teacher affiliates, although very close. OSSTF had recognized those realities for many

years, as evidenced by its early historical evidence (Exhibits Nos. 644, 669, 670), and in a more substantive way in 1975, as evidenced by its study on the effect of sexism upon the career development of teachers (Exhibit No. 92).

OSSTF accepts that gender is a "social construct" as that term was used by the experts. OSSTF can also accept that outside of the teaching profession there is evidence that in certain groupings males may dominate conversation, and may disregard the real interests of women. OSSTF also accepts the premise that in society as a whole individuals may not always be cognizant of the fact that they are the victims of systemic discrimination, whether they be women, or other disadvantaged groups. To deny any of the above would be ineffectual, although there are individuals whose own experience leads them to hold the honest belief that this is not so.

FWTAO in its submissions agreed that some progress had been made to end *inequality*, a term which is more appropriate than that of *discrimination*. Counsel for FWTAO appeared to place some considerable reliance on the testimony of Monica Townson whose evidence is commented on in Part I of this decision and about certain aspects of which I expressed concern. Still, let me quote two passages from Ms. Townson's Notice of Evidence that, at one and the same time, signify the progress and the distance yet to go in ending inequality as applied to women public elementary teachers. (See, Exhibit 529, at ¶s 23-24.) In this regard, note that the emphasis is on the promotional process and wages which Ms. Townson saw as important elements reflected in systemic discrimination:



23. It is not easy to eliminate systemic discrimination, especially when it permeates a major institution like the Ontario public elementary school system. However, women public elementary school teachers are making steady and measurable progress. Data presented in Tables 9 through 14 demonstrate this progress: (a) the wage gap between women and men teachers in the public elementary school system has been narrowing steadily since 1944 (Tables 9 and 10); (b) the rate at which the wage gap widens as teachers accumulate has been slowing down in the last ten years (Table 11); and (c) women who teach in Ontario public elementary schools are making measurable progress in attaining positions as principal and vice-principal, relative to women who teach in Ontario secondary schools (Tables 12 to 14).

24. *Women teachers are concentrated at the low end of the salary ranges.* As might be expected, women elementary teachers in Ontario seem to fare better than their counterparts in the rest of Canada. However, the gap between women and men teachers is obvious. Table 1 illustrates that among full-time elementary school teachers in Ontario, 44% of male teachers earned more than \$44,000 a year in the 1985-86 school year, while only 23% of women teachers earned more than \$44,000 a year. (At the national level, the percentages were 32% and 9%.) At the other end of salary range, less than 8% of male teachers earned less than \$25,000 a year in 1985-86, while 28% of women elementary school teachers were in this salary range. (At the national level, the percentages were 10% and 30%.)

Ms. Townson made clear that the reason for the wage gap as experience increases "is undoubtedly the fact that women receive significantly fewer promotions than men - as data presented later in this affidavit will clearly show. . . ." (Exhibit 529, at ¶29.) Ms. Townson prepared estimates as to how long it would take to achieve the announced goal of the Ministry of Education of 50% PAR for women teachers in the public elementary schools by the year 2000. In effect, she determined the number of women public elementary school teachers in PAR positions from 1978 to 1988 and measured the rate of their "improvement," that is, the increased number of positions taken. Using that percentage derived from the rate of improvement, she then projected how long it would take to achieve 50% PAR for public elementary school teachers. Her conclusions were: 39 years to achieve 50% PAR for the position of principal and eight years for the position of vice-principal. (Tr. Vol. 50, at pp. 6865-6866.)

To some extent, the annual *Report to the Legislature by the Minister of Education: The Status of Women and Employment Equity in Ontario School Boards* reflects the progress and what may be perceived as its slow pace. (The parties in these proceedings tended to cite the 1989 annual report, Exhibit No. 485. For the purposes of this subsection, I will refer to the more current report of record, the 1990 annual report, Exhibit No. 729.)

Under the heading *Occupational Categories*, it was stated:

Policy/Program Memorandum No. 111 [of the Ministry of Education] requires school boards to increase the representation of women to 50 percent or more by the year 2000 in the following three positions:

supervisory officer, principal and vice-principal. However the following 1989 data reveal that women are still grossly under-represented in these positions, although their representation has increased since 1988:

*Percentage of Women in Positions of Added Responsibility, 1989*

<i>Position</i>	<i>Percentage</i>
Supervisory officer	14.7
Elementary principal	20.8
Elementary vice-principal	38.8
Secondary principal	12.5
Secondary vice-principal	23.3

These data are particularly disappointing in view of the pool of trained female personnel available for these positions. In 1990, women made up 45 percent of all successful candidates for the supervisory officer's certificate and 62 percent of those achieving the principal's qualifications. (Exhibit No. 729, at p. 18.)

The overall data, however, probably should not have been "particularly disappointing" to the Ministry if more weight had been given to the relationship between the *number of vacant positions and the number of females appointed to those positions*. In 1989, there was a provincial-wide total of 980 PAR positions vacant, and women were appointed to 427 of the postings. This certainly is not 50 percent, but it also is not the year 2000. And, one should add that unless a more dramatic approach is taken to employment equity as it relates to PAR, the salient figure for determining the rate of change must come in relationship to filling vacant

positions. (Exhibit No. 729, Table 2-1, at pp. 34-38.)

The Ministry of Education presented the following comparative analysis of full-time educational elementary school staff for 1978 and 1989 in terms of the distribution of female and male teachers:

- In 1978, women in the public school boards held 11.9 percent of PAR. In 1989, the proportion of women holding these positions had more than tripled to 37 percent.
- Although about three times as many females as males were teachers in 1989, men were four times as likely to fill the position of principal.
- Although there were thirty-five *fewer* principal positions in 1989, there were 282 *more* females and 317 *fewer* males in these positions than there were in 1978.
- The percentage of female elementary principals in 1989 was 18.2, almost *triple* the 6.7 percent figure for 1978.
- The 1989 data also show a relative increase in the number of females and a decrease in the number of males from the 1978 data in the position of vice-principal (females: + 380; males: -107).
- The percentage of female elementary vice-principals in 1989 was 39.4, more than twice the 15.5 percent figure in 1978. (Exhibit No. 729, at p. 21.)



Applying the criteria of PAR and wage gap, the evidence leaves no doubt that there is inequality between female and male elementary school teachers. But, there also is no doubt that real progress has been made in ending that inequality.

What, then, should be the meaning to be drawn from these conclusions? Perhaps it is fair to say that this is the kind of context in which a section 14 special program could be particularly meaningful: Progress is being made. There is momentum. A special program, *properly qualified*, could further stimulate the rate of change. In this regard, I note that there is nothing in the language of section 14 which precludes an organization, such as OTF or FWTAO, from coming forward with a special program that might add to or otherwise supplement the government's employment equity program. Note again the language of section 14(1): "A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is *likely to contribute to the elimination of the infringement of rights under Part 1.*"

However, there is a *caveat* implicit in what has been stated. It is one matter to state that a condition of inequality exists upon which a special program within the meaning of section 14 can be developed. It is quite another matter to state that an organization has in fact established such a program merely by articulating *generalized goals that might be interpreted as reflecting an intent to end inequality.* In this regard, I call attention to the *specific means for implementing the government's employment equity program in Ontario schools as they have been set out in the 1990 annual report to the legislature, noted above.* I do this for three reasons. First, there is a well-defined goal, namely, to ensure that 50% or more

women fill PAR by the year 2000. Second, the means to achieve that end are both institutionalized and quite particular. Third, the program is one that surely is open to organizations such as OTF and FWTAO to provide specific input in terms of "listed components" imposed on boards of education. (I do not make this point even as a suggestion. I make the point only to demonstrate how a program, as such, can evolve in terms of satisfying the statutory criteria of section 14):

School boards are expected to designate senior officials to be responsible for translating these policies into action. They must also submit to the ministry details of their employment equity policies and programs and provide annual progress reports.

School boards employment equity programs should include the following components:

- *Needs assessment*: a data analysis to determine the percentages of women employees in each category and a review of corporate policies and procedures to ensure that they do not discriminate on the basis of sex.
- *Goals and timetables*: realistic statements of outcomes based on needs assessment and projected vacancies.
- *Strategies*: special measures to increase the representation of women in senior positions and to overcome systemic discrimination.

- *Monitoring and evaluation procedures*: activities designed to ensure that the program is on schedule, to provide information for the September Board Report, and to review and modify as required the goals and timetables.

- *Resources*: sufficient budget and human resources (e.g., a senior official to act as co-ordinator) to ensure that the program is implemented and maintained.

Policy/Program Memorandum No. 111 requires boards to communicate periodically with their staffs on the focus on employment equity and on the progress being made. Boards' ongoing human resources planning and management practices should reflect their commitment to employment equity for women (e.g., through employment equity training for personnel and a policy on and procedures for dealing with sexual harassment). (Exhibit No. 729, at p. 15.)

#### **D. The Historical Development of FWTAO, the OTF and Its Other Affiliates**

I will begin this heading with what might be called the historical development of the Affiliates. It will help, I think, to understand how and why the Affiliates came into being. Emphasis will be given to the origins of FWTAO. My reason for doing this is to better understand the nature of its claim as having been an advocacy, equality-seeking group for women elementary school teachers from its inception. That claim formed a part of the argument by FWTAO as to justification for section

14 status. In this regard, I will define somewhat more precisely the constituency of that organization. In doing this, questions will be asked as to whether and to what extent FWTAO has been an advocate for *all relevant women teachers within its sphere of membership*.

It should be noted and emphasized that the claim FWTAO is making as a special program within the meaning of section 14 is sweeping. It relates to all women public elementary teachers in Ontario. And, its subject matter, as I understand the claim, necessarily embraces all that is substantively contained within the *Human Rights Code*. This is in sharp distinction, by way of illustration, to the Affirmative Action/Equity Employment Program of the Ministry of Education which, as noted, is quite specific in its goals, such as that of obtaining positions of added responsibility (PAR) for women. (Exhibits Nos. 485 and 729, described in the previous section.)

In its final argument in these proceedings, Counsel for FWTAO stated:

¶829 (iii) - The organization chosen by the majority of women elementary teachers in Ontario is the FWTAO, an organization that in its founding and consistently throughout its history has been assisting women elementary teachers to achieve equal opportunity.

...

¶835 - It is submitted that the program in question here has been developed by women elementary teachers for women elementary teachers, and has been carefully considered, honed and calibrated for a



long period of time in order to ensure that it continues to meet the needs and express the wishes of the majority of women elementary teachers in Ontario. As the considered articulation of the wishes of a disadvantaged group, it should not be disturbed by this Board. (3 Argument on Behalf of FWTAO, at pp. 273-275.)

I embark on this analysis not to be critical of FWTAO, which by any measure must be seen as a powerful and effective organization of Ontario women public elementary school teachers. Rather, I do this in the context of dealing fully and fairly with the claim of FWTAO that as an organization it has always been an advocate for the interests of women public elementary teachers in Ontario.

I believe the facts will demonstrate that, like any representative organization, FWTAO over the years has had to make choices *vis-a-vis* important segments of its membership. Such choices have been effected not only by those who held majority status within the organization, but they have also been effected by what the organization realistically believed it could achieve in the societal and political climate in which it had to function. These are important, albeit not remarkable points. They have an obvious bearing, over and above the historical development of FWTAO, on a central issue in this case: Can an organization, specifically, FWTAO, qualify as a *special program within the meaning of section 14 of the Human Rights Code*?

### **1. An Early Example of Representative Conflict: Married/Single Women Teachers**

At an early point in its history, conflict within the FWTAO membership existed

relating to married/single women elementary school teachers. (I focus on elementary school teachers even though the problem of discriminatory treatment of married women teachers existed as well at the secondary level. My reason for focusing on elementary school teachers is that it is FWTAO which has claimed historic roots as an equality-seeking organization that, as such, established the foundation in the organization itself as a special plan that would meet the criteria for section 14 of the *Human Rights Code*. Neither OSSTF nor OPSTF have argued that they, as organizations, are to be viewed as special plans within the meaning of section 14, though both have stated that they have been sensitive to issues of gender equality.)

Historically, and until recent times, there was discrimination between married and single women elementary teachers. By and large, the weight of FWTAO had, until the 1950s, swung in favour of single teachers. The best evidence of this comes from the minutes of FWTAO which were received in evidence as Exhibit 110(a) and (b); the minutes of the OTF's Board of Governors (1944-1954), Exhibit 114; and minutes of the Ontario Trustees' Council and the OTF Executive, Nov. 21, 1953, Exhibit 119.

There have been witnesses who have read histories and studied archival documents relating to this subject. And, in many respects, I have given substantial deference to their interpretation of events and documents. However, I believe the documents written at the time and received in evidence offer the *best evidence of what in fact occurred*.

What one finds in those documents is that at an early point, and certainly as early as the Great Depression, married women teachers were discriminated against *both by*

*their employers and FWTAO.* The discrimination was pervasive. This was a form of job protection for the single woman teacher. Once, however, her status changed from single to married, her job position as a teacher became highly vulnerable. School boards or trustees apparently had a range of options. Even during the course of a term, they might discharge the newly married teacher. Or, they might continue her employment on a temporary basis. Should that employment be continued, then it was altogether possible that that teacher's salary would be at a reduced level.

This did not mean that married teachers were fully excluded from teaching. By 1953, one estimate attributed to FWTAO - and not contradicted by their Executive Secretary, Mrs. Helene M. Ward, who was present at a meeting of the OTF Executive . and the Ontario Trustees' Council where the estimate was given - indicated that *27 percent of FWTAO membership were married.* (Ex. 119, at p. 4.) This placed the married teachers in a minority position in relation to the remaining FWTAO membership. But, it must also be said that the married teachers reflected a significant minority.

There were a number of reasons given by school employers for such discriminatory treatment. (The reasons set out are summarized from those offered by board of education officers or members in 1953. They spoke in terms of Ontario boards of education. See, Exhibit 119.)

- What was termed a "Regulation" had "always" been in effect. The "Regulation" was not one of the Ministry of Education. Apparently, it was a rule enacted by individual boards of education. And, once the rule was "on the books," board administrations had no choice but to end the employment

even of excellent teachers.

- Teachers who married placed themselves in a position of divided loyalties. There was an inherent conflict between their families and their responsibilities toward their schools.

- Married women teachers did not need their salaries in the same way as single women teachers. They had the support of their husbands. The removal or lessening of this economic need might have a corresponding effect on the motivation of women teachers.

- If married teachers were to continue to be employed, then, recognizing that their school commitment at most could be honoured only on a year-to-year basis apparently because of the possibility of pregnancy and child-rearing duties, board contracts with them should be temporary. At most, they should be hired only on a yearly basis. It followed that such employment would be one of reduced income relative to permanent teachers.

It should be noted and emphasized that not all boards discriminated against married teachers. (1) Some took the view that individuals were hired as teachers and not on the basis of their marital status. (2) Others said that the reasoning behind the so-called rule no longer applied: There was the assumption that housework remained "women's work." However, times, it was stated, had changed. No longer did a woman have to work full-time to complete such housework. There was time to teach. (3) And, still others recognizing in 1953 what appeared to be a shortage of teachers, urged that the rule was counter-productive. It denied schools quality



teaching solely because a woman was married. (Exhibit 119.)

In my view, reflected in what has been stated thus far concerning married teachers, a full and authoritative statement came from the minutes of a meeting of the Ontario Trustees' Council and the OTF Executive on Nov. 21, 1953, set out fully in Exhibit 119. (It is fair to say that the Ontario Trustees' Council consisted of leading representatives of public and separate schools in the province. They included representatives of the Ontario School Trustees and Ratepayers' Association, the Associated High School Boards of Ontario, the Ontario Public School Trustees' Association, the Ontario Separate School Trustees' Association, L'Association des Commissaires des Ecoles Bilingues d'Ontario, and the Northern Ontario Public and Secondary School Trustees.)

The comments of the Ontario Trustees' Council were in response to an OTF agenda item for discussion relating to equal treatment between married and single women teachers. *Specifically, the OTF had for discussion two points under the broad heading: (a) "that marriage not be considered grounds for the termination or change of the contract of a woman teacher; and (b) that adequate maternity leave be granted . . . ."*

While this matter will be more fully described under (g), *infra*, of this heading, it should be noted that a request from OTF to discuss equal treatment of married women teachers in relationship to single women teachers did not arise until nearly a decade after the establishment of OTF. I will begin the description and analysis at a point of severe national economic difficulties. We will see illustrations of actual discrimination against married teachers. However, with the passing years, changes

began to occur, though not as frequently and as fully as one might have liked. Moving from the 1930's to the 1950's, we will observe that FWTAO *and other Affiliates* acted to strike at discrimination against married teachers. Here the essential point is that FWTAO was not alone in urging an end to such discriminatory practices. And, clearly this fact has some bearing on FWTAO's claim to be recognized as a special program - if there are other Affiliates that have also taken up the challenge in meeting the needs of women teachers subject to discrimination in their work.

a. Partly because of a surplus of women elementary teachers, and partly because of difficult economic times, single elementary women teachers who appeared to control FWTAO votes twice moved to have that organization act against married teachers. The Minutes of the Annual FWTAO Meeting in 1932 had the following resolution put forward by the Resolutions Committee: "That on account of the present surplus of women teachers, Boards [of Education] give preference to the unmarried woman except in cases where the married teacher is the sole support of the family." (Ex. 110a, at Tab. 15, p. 2.)

b. At the FWTAO 1934 Annual Meeting, the London Normal School submitted the following resolution: "Whereas, as there are at present a number of married and widowed women teachers who by virtue of personal property, pensions or their husband's income, are not dependent upon their salaries for a living, and whereas these persons are in a position to teach for their living, with the result that salaries are lowered beyond necessity, we hereby petition the Department of Education for Ontario to pay no grants on

the certificates [in effect, to deny compensation] held by married or widowed persons unless it is proved by them to the satisfaction of the Department of Education that they are in need of such employment."

The resolution was tabled. But, the reason for doing so was the belief on the part of a majority of the voting membership that the underlying rationale of the resolution might strike as well at single teachers. There seemed to be no hesitancy at striking at married women teachers. So it was that each local Federation was urged to focus on individual cases with them in mind, "approach [their] local board."

The FWTAO minutes, having stated the resolution quoted above, continued: "Tabled. This question not only means the probing into personal affairs, but it also means that if you are objecting to those teachers who are not dependent upon salaries for a living that you would have to include all those daughters whose fathers are able to support them. It was therefore carried that this resolution be tabled, but that each local Federation, where there are such cases, approach [their] local board." (Ex. 110, Tab. 17, at p. 5.)

c. The FWTAO Minutes suggest that married teachers either were denied membership in the organization, or that they were given some kind of diminished status until 1942, twenty-four years after the organization's founding. For example, the 1940 Minutes of FWTAO's Annual meeting contain this comment from the Secretary's Report: "She also spoke of the special difficulty of the Women's Federation in keeping up membership because of the constant loss each year of an average of 500 members through

*marriage, superannuation, etc..*" (Ex. 110, Tab. 23, at p. 1).

In 1941, a resolution was placed before the annual FWTAO meeting from Rainy River and Kenora District: "Let it be resolved that the married women teaching temporarily be considered associate members and be extended the courtesy of the newsletter. The Executive recommended that we approve this resolution and on motions of Misses Meek and Campbell the recommendation carried." (Ex. 110, Tab. 24, at p. 2.) At the next annual meeting, however, there appeared to be an effort to place the married teacher on the same footing as the single teacher by requiring the same level of dues payment. The following is recorded in the 1942 FWTAO minutes under the heading of new business:

The secretary asked for clarification of social and associate membership since several local treasurers were confusing the two. This brought up the question of continuance of associate membership without fee to the married women teaching temporarily and it was carried on motion of Misses Meek and Fulcher that *the fully qualified teacher whether married or single should be required to pay the full [FWTAO] fee while drawing salary from her board and enjoying the privileges of Federation [FWTAO] membership.*" (Ex. 110, Tab. 25, at p. 6.)

This was no great benefit to the married teacher whose tenure with a school board was likely to be on a temporary basis and therefore at a lower salary. She would have been paying the same dues - that is, the full fee - as her full-time single colleague. (See, Exhibit 119.)



d. There came before a meeting of the OTF Board of Governors from Aug. 28-30, 1950 a report with recommendations from the OTF Committee on Equal Pay. An individual identified as Miss Norma Hackett of FWTAO held the chair in terms of the Committee report, the thrust of which was that there should be equal opportunity, equal pay, equal qualifications and equal responsibilities without regard to *race, creed or sex*. FWTAO was very much involved in shaping resolutions emanating from the Committee as they related to equal pay in relation to grades taught. (Ex. 114, Tab. 11, at pp. 39-40.)

Nothing was said in the discussion before the OTF Board of Governors concerning *equality without regard to marital status*. Dr. Florence Henderson - former Executive Director of FWTAO, and held out by that organization as a person who has studied and understands well the history of FWTAO as will more fully be described below - was asked the following by OPSTF Counsel:

Q. At page 39 [Tab. 11, Ex. 114] we have set out the report of the Committee on Equal Pay which defined equality, and that eventually became an OTF policy, did it not?

A. Yes.

Q. And the equality was predicated on race, creed and sex?

A. Yes.

Q. Marital status was not included?

A. No, it's not.

Q. FW[TAO] did not make a motion to include marital status?

A. Forty years ago apparently they did not.

Q. And at the time FW[TAO] didn't have its own policy on marital status other than what we have seen.

A. It was not brought to bear on this item at this time. (Tr. Vol. 27, at 3212.)

I cannot accept the view, suggested by FWTAO Counsel, that implicit in the committee statement was the proposition that equal pay was proposed as well for married women teachers. Otherwise, so the rationale seems to be, discrimination would be permitted against married men. The clear facts, however, are that the primary kind of discrimination against married women teachers was that of *dismissal*. The requirements of equal pay did not apply to the dismissal of such teachers. To the extent that they were retained as employees, then they were given the separate status of temporary employees on a term contract at a rate of pay applicable to this classification.

In effect, the equal pay proposals would not have applied to the great majority of married teachers. In this regard, it should be noted that quite early in its history - long before the founding of OTF - FWTAO announced quite emphatically a goal of equal pay for equal work. Only a year after its establish-

ment, at its annual meeting in 1919, the President of FWTAO stated:

"Another span to the bridge is needed. *Equal Pay for Equal Work*, and we can look forward in faith and hope and help to build that span. Standing on that bridge as we do today, we cannot let things remain as in the past. . . ." (Exhibit No. 110(a), at Tab 2, p. 12.).

And, in 1920 an individual identified in FWTAO minutes as Miss A.E. Marty, M.A., LL.D., Inspector of Public Schools, Toronto, in her address to the annual meeting of FWTAO said: "The principle of equal pay for equal work to men and women should be recognized and the preferred positions should be open to women on equal terms with men." (Exhibit No. 110(a), at Tab 3, p. 26.) But, this position was one carried forward in relation to a membership dominated by single women in a working climate of pervasive institutional discrimination against married women. (See, Exhibit 117.)

e. In 1952, eight years after the establishment of OTF, discrimination against married women teachers was noted by Dr. LaZerte, President of the Canadian Education Association. His comments, made as part of his presidential address to the CEA, were summarized in the minutes of the FWTAO's 1952 annual meeting. (Ex. 110, Tab. 35, at p. 3.)

The same minutes set out the names of those holding office in FWTAO. At that time, the use of *Miss* and *Mrs.* was current. Of the eleven members of the FWTAO Executive, three were identified as being *Mrs.*. The Board of Directors for the five regions of FWTAO consisted of six members each for a total of thirty members. Of the thirty, a total of five were identified as *Mrs.*. There

were three members of the Advisory Board. All were identified as *Miss*. There were thirteen *conveners of committees*, including those relating to status, superannuation, and teacher education and certification. All save one were identified as *Miss*. The single member identified as the convener for public relations, interestingly, was *Mr.* Charles Tisdall of Toronto. Not one convener of a committee was identified as *Mrs.*.

f. I now come to the 1953 annual meeting of FWTAO. The meeting was held on Aug. 26, 1953. The meeting of the OTF Board of Governors was to be held five months later at which time the Committee on the Status of Married Teachers was to report with recommendations. The FWTAO minutes in *other* respects did raise OTF recommendations scheduled for discussion. (See, Ex. 110, Tab. 36, p. 9.)

The only mention of married women in the FWTAO minutes of that year came from its Report of the Status Committee where the following was stated: "*Acceptance of certificates of teachers from other provinces and from the British Isles was discussed; as were also the status of married women teachers and the problem of mental ill-health among members of the profession.*"

g. As noted at the start of this subsection, the OTF Board of Governors met in January 1954 to consider a Report of the Committee on the Status of Married Teachers. This was an important report, the first of its kind in relation to OTF, so far as I can determine from the record. In this regard, it is interesting to note that the Committee was *not established at the initiative of OTF*. Rather,



according to the OTF Minutes, at p. 39, it was *set up at the request of the Ontario Trustees' Council*. "... Miss [Nora] Hodgins [Secretary-Treasurer of OTF] replied that the Committee was set up at the request of the trustees." (Exhibit No. 114, Tab 15, at p. 39.)

The Chair of the Committee, who presented the report was identified in the OTF minutes as Miss Claire Coughlin of OSSTF. It was moved by Miss Coughlin and seconded by Miss Laretta Leveque of AEFO that the report be received. The motion carried.

It was then moved by Miss Coughlin and seconded by Miss Dorothea McDonell of OECTA and carried "*that marriage not be considered grounds for the termination or change of the contract of a woman teacher.*"

I pause here to note that nine of the ten OTF Governors from FWTAO were present at the meeting. The initial motions thus far described were put by Governors of other organizations, including OPSMTF, and by individuals who, having been identified as *Miss*, appeared to be single and female.

The next motion was from R.J. Bolton of OPSMTF and seconded by Miss McDonell - who, as mentioned, was a member of OECTA - that the Committee recommendation concerning maternity leave be approved, namely "*that adequate maternity leave of absence be granted, subject to the following:*

- (a) If possible, leave should be requested to coincide with the legal

contract year;

(b) A teacher, at the school board's request, may return at any time, but should not expect to resume duties at a time other than September 1 or January 1;

(c) A teacher should leave when pregnancy becomes apparent;

(d) Leave should be requested early, to give the Board ample time to obtain a replacement;

(e) Leave should not exceed two years."

The motion carried.

It was then moved by Sister Mary Lenore of OECTA and seconded by Mrs. Florence Irvine of FWTAO that the following recommendation of the Committee be approved:

That the resolution *That married women returning to the teaching profession after an absence of five or more years be required to take a refresher course, planned for their needs* be referred to the Teacher Education and Certification Committee for further study, since it feels that the resolution should read *all teachers*, instead of *married women*."

In the result, the report of the Committee was approved, and it was agreed that a meeting should be held with the Ontario Trustees' Council and the OTF Executive to discuss the recommendations of the OTF.

Before leaving the report and the recommendations put in the form of motions to the OTF Board of Governors, it should be noted that (i) it was not FWTAO that put the primary recommendations relating to ending discriminatory treatment of married women teachers, but rather a mix of representatives of other Affiliates, including OPSMTF and OSSTF as well as AEFO and OECTA. They all seemed to share a concern in ending discrimination against a not insubstantial number of the OTF's statutory members. It cannot be said that FWTAO stood alone in the search and realization of women's equality as applied to married women.

The OTF meeting was preceded by a joint meeting of the Ontario Trustees' Council and the Executive of the OTF on Nov. 21, 1953 at OTF headquarters in Toronto. Twenty-two persons were present, including representatives of each of the five OTF Affiliates (in their role as members of the OTF Executive). Ms. Hodgins, Secretary-Treasurer of OTF, had submitted a letter the substance of which she asked be considered at the meeting. That letter stated in pertinent part:

... The status of married women. We [OTF] feel that married women should be employed by school boards on the same basis as single women, but we appreciate the fact that there are certain problems arising with regard to their employment and we would suggest the

following points be discussed:

(a) that marriage not be considered grounds for the termination or change of the contract of a woman teacher; and

(b) that adequate maternity leave be granted.

We have no policy as regards (b) at the present time, but we would like to discuss it with you. (Exhibit 117, at p. 1.)

I have taken selected extracts of the meeting. They bear quoting. They demonstrate institutional discrimination against married women. And, they reflect the concern of members of the OTF Executive (and, it must be said that they also stood as representatives of their respective Affiliates). That concern was that married women teachers were not being treated fairly. From FWTAO, it was *Mrs. Helen Ward*; and from OSSTF, it was *Mr. S.G.B. Robinson* and *Mr. G.L. Roberts* who spoke against that discrimination:

Mr. Hulse [President of the Trustees' Council and also Chair of the meeting] stated that as far as the [Trustees'] Council itself was concerned there had been no definite policy laid down. Dr. Taylor of Windsor felt it was a local problem and should not be handled at the Council level. He said theirs was one board that asks for the resignation of a teacher when the [marital] status of the teacher changes. They may reapply if they wish to continue to teach. . . . When a teacher does reapply, they are hired on a year-to-year basis. He said his board felt very



strongly about this matter, since they could guarantee that their agreement would hold, but wondered whether a married woman could guarantee her agreement. He felt a married woman's work and interest were divided. Regardless of whether maternity leave is required, her status has altered entirely with respect to carrying on as an individual. . . .

Mrs. Ward [of FWTAO] felt that she had been employed as a teacher - not as married or single. . . .

. . . Mrs. Ward answered that all members of OTF would agree that married women teachers should not ask for different treatment from single teachers, but rather the same treatment. Mr. Roberts [of OSSTF] said that in Oshawa they had a woman on their staff who was well up in her forties and who recently was married. She was also one of their best teachers. Her home duties did not interfere with school duties, but because of the Regulation on the books of the board, the board has asked for her resignation. He felt it was a waste of good teacher material. He felt that the Federation [OTF] would be quite happy to see a board say a teacher was not efficient and her marriage has added to the inefficiency, but they did not like to see a teacher dismissed simply because she was married. Mr. Roberts said that the woman he had mentioned would be employed on a temporary basis only, and would lose quite a bit of salary. . . .

Mr. Robinson [said] . . . we are faced with a national crisis insofar as

teacher supply is concerned. It may well be that locals of the Federation were very much opposed to married women teachers. [But] we are in a crisis now which is going to get progressively worse. . . . He said that according to surveys taken in Scandinavian countries, they prefer married women to single women insofar as proficiency is concerned. He wondered whether the Trustees' Council would consider informing the school boards through the affiliates of the Council that we are faced with this problem and . . . suggest that they consider means whereby they can use as far as possible married women who are available in their community. That would not interfere with the autonomy of the school boards, but it would point up an emergency situation and it might help. . . .

. . . Mrs. Ward said that we hear a lot and read a lot about the shortage of teachers, the birth rate, the size of schools, the children entering schools, and here was this pool of married teachers to draw upon. Mr. Roberts felt that married women teachers were employed at lower salaries than boards would have to pay for a single teacher. . . . [He] stated that *emergency or no emergency, what the Federation [OTF] was concerned about was that these married teachers get fair treatment. . . .*" (Exhibit 117, at pp. 3-4.)

Again, the point is that what one reads relates to representatives of another Affiliate, OSSTF, a mixed-gender organization, exercising initiative in trying to obtain better treatment for married teachers.

## 2. A More Current Example: Representing the Unrepresented - Occasional Teachers

FWTAO takes the position that as an organization it qualifies as a special program within the meaning of section 14 of the *Human Rights Code*. An important contextual matter, however, is the need to define the makeup of FWTAO, itself. Is it indeed representative of the interests of all women public elementary school teachers? In posing the question I hasten to add that I am not asking whether FWTAO purports to be representative all women as individuals. Rather, as with the married teachers, the question is placed in the context of *real, presently identifiable interests*.

So it was that the historic position of the organization as it related to married teachers was explored because FWTAO held itself out as an organization which, since its founding in 1918, had been an equality-seeking association. Also, as it was described in Part I of this decision, and for the same reasons as with married teachers, there was some in-depth exploration of FWTAO's position *vis-a-vis* non-degreed teachers who were (and continue to be) placed in the low-pay categories of B, C and D of the teachers' salary grid (except to the extent this is varied by pay equity or local bargaining). At the very least, what was observed could be described as ambivalence in terms of FWTAO pressing *early* for recognition of these low-paid (and mostly female elementary school) teachers in relation to their *experience and hands-on classroom teaching in setting their wage rates on the salary grid*. (Clearly, that situation does not now seem to exist. Exhibit 385, FWTAO: *Bargaining Priorities - 1990-1991: Adequate Salary Levels for All Teachers*.)

In this subsection, another example of the difficulties faced by FWTAO (or, it

might be, any organization seeking the status of a special program under similar circumstances) will be presented: the status of the *occasional teachers in public elementary schools*. It will be seen that in some important respects they, like the married teachers, are disadvantaged. And, except for OPSTF and non-teaching unions such as the Canadian Union of Public Employees and the Ontario Public Service Employees' Union, they are not represented at the elementary level.

For FWTAO, that non-representation is a conscious decision. In the description and analysis that follows, *it must be emphasized that I do not criticize the decision of FWTAO on its stance in relation to occasional teachers. But, what I do ask is how that position could be taken without full participation of such teachers in the context of a section 14 claim under the Human Rights Code?* That is, how is it possible for FWTAO to represent the vital interests of female public elementary school teachers if not all groups affected by such decisions have a role to play in their making?

Occasional teachers are individuals perhaps better known as *supply teachers*. Among other things, they fill in for the full-time teacher under contract who becomes ill, or in an emergency is not able to fulfill her/his teaching duties. Often the employment period is of short duration, no more than a few days. Sometimes, however, for example on the death of a full-time teacher, the substitution might be for the larger part of a school year. Their numbers are not certain but, according to the Ontario Labour Relations Board, in 1986 they numbered in the "hundreds":

The [Ontario Labour Relations] Board has dealt with or currently has before it, certification applications involving literally hundreds of



occasional teachers seeking representation by the statutory collective bargaining agents which represent their teacher counterparts covered by Bill 100. (*Re OPSTF and the Board of Education for the City of Windsor*, OLRB, March 5, 1986, at p. 7: hereafter referred to as *City of Windsor case*.)

(In the *City of Windsor case*, the OLRB dealt with opposition from the Windsor Board of Education for certification of OPSTF as bargaining agent for public elementary school teachers. Among the matters at issue were whether OPSTF discriminated against its female voluntary members and whether its principal and vice-principal statutory members were in fact management with the result that OPSTF would not be deemed a trade union under the *Labour Relations Act*.)

While precise data relative to the number of occasional teachers in Ontario public elementary schools does not seem to be present in this record, the 1986 *City of Windsor case, supra*, does offer an illustration. There were about 40 public elementary schools in the City of Windsor, employing approximately 650 classroom teachers. (*Id.*, at p. 18.) The Windsor school board maintained a list of about 80 occasional teachers both qualified and willing to work. The OLRB stated:

The list is no guarantee of any particular volume of work, but over the years a pool of 80 occasional teachers has been sufficient to both meet the [school board's] needs, and generate a sufficient number of work opportunities to keep the occasionals active and interested. In addition, there is a subsidiary list of about 100 qualified individuals who could be added to the active list if some of its members became unavailable.

(*Id.*, at p. 21.)

Not only are the numbers of such teachers large, but they are predominantly women. (Tr. Vol. 37, at p. 5071.) The conditions of their employment are certainly not the same as those of their full-time colleagues. In cross-examination of Ms. Wescott, Executive Director of FWTAO, there was the following exchange with Counsel for OSSTF:

Q. Do you agree with me there is a pay equity issue involved for occasional teachers as well in the sense that they are performing many times the same or similar work as teachers who are under contract, there are long-term occasional teachers getting paid far less?

A. As I said before, I recognize that the current working conditions for occasional teachers may not be as good as I would like to see them. That is why we want to get them into the collective agreement. That is why I want to get them included in the definition of *teacher* [under Bill 100] so their responsibilities also are similar to that of a regular teacher.

Q. Has FWTAO ever attempted to organize its members who are occasional teachers with the pay equity argument?

...

A. We have not taken that action at this point.

...

Q. So, there is interest in occasional teachers but not sufficient to go out and organize?

A. . . .[O]ur position is [that] occasional teacher[s] should be within the definition of *teacher* so they could be . . . members of OTF rather than having to be voluntary members so they could be included in the collective agreement, and we feel taking other action has detracted from reaching what we have seen as the long-term goal, and I suppose this really speaks to the way that our Affiliate differs from some of the other Affiliates.

We have a principle that we believe is the right one for occasional teachers, and we have maintained our position toward attempting to achieve that, and other Affiliates have determined to take a different route. We still believe that the right way to go is to have them [occasional teachers] in the definition of *teacher* [under Bill 100], and we are hoping that we will be able to achieve that through OTF.

(Tr. Vol. 34, at pp. 4384-4386.)

It was in 1978 that all of the Affiliates and through them the Affiliate Committee on Membership endorsed a proposal to recommend to the government that Bill 100, the *Teaching Profession Act*, be amended to include occasional teachers within the definition of *teachers*. (Exhibit No. 333, Minutes of the OTF Executive Meeting, Dec. 15, 16, 1978.) However, the government chose not to act on that recommendation

which, at the time of Ms. Wescott's testimony, covered a period of twelve years (1990).

Still, FWTAO did not let matters rest with its endorsement for inclusion of occasional teachers within Bill 100's definition of teachers. FWTAO permitted occasional teachers to become voluntary members of the association, and it established a number of (a) policy statements regarding occasional teachers, and (b) proposed collective agreement terms which, if possible, were to be integrated into the full-time collective agreements. (See, Exhibit No. 18: FWTAO Guidebook 1988-1989, at pp. 233-234 as to policies and procedures regarding occasional teachers. See also, Exhibit Nos. 412-413: *FWTAO Master Collective Agreement - proposals for occasional teachers.*)

FWTAO did all this, Ms. Wescott seemed to be saying, in "dialogue" with its occasional teacher voluntary members:

Q. In your idea of how to deal with occasional teachers at the present time would you, including them in these model clauses, would you allow occasional teachers to vote on the acceptance or rejection of a collective agreement?

A. I don't think the current legislation allows for their vote officially under the legislation.

Q. Unofficially, would you give credence to their expression, their wishes expressed in a vote?



A. I think that occasional teachers should be - I hesitate to use the word *consulted* because that has such a large number of interpretations - but I believe there should be dialogue with the occasional teachers at the local level to determine their views. My understanding is in many situations the occasional teachers have determined to form somewhat of an informal network and there would be a process by which there could be communication with them.

Q. Again I ask you, Ms. Wescott, is it not understandable that some female teachers may wish to be represented by an organization that is more aggressive in furthering the interests of women, in this case, the women who are occasional teachers?

A. I suppose if they base their decision on that one aspect. (Tr. Vol. 37, at pp. 5077-5078.)

FWTAO permits women occasional teachers to become voluntary members of the Association. As such, their rights, especially the right to vote on such matters as policies affecting them as occasional teachers, are limited. Article IV, §2 of the FWTAO Constitution provides: "Voluntary members shall be women whose applications are approved by the Board of Directors and who qualify for membership in the OTF and who are certified as teachers and who: . . . (e) are engaged in an educational capacity . . . ." By-Law 4, §2 contains the limiting conditions:

(a) Voluntary members shall have all the rights, privileges and responsibilities of statutory members, *except in matters relating to*

*tenure of position, salary negotiations, voting and holding elective office in the FWTAO or its associations. (Exhibit No. 18, FWTAO Guidebook, 1988-1989, at p. 24.)*

Now contrast these rights and their limiting conditions with those afforded by OPSTF to its occasional teacher members as a result of resolutions approved at the 1984 OPSTF Assembly which, in effect, allow for the organization and certification of occasional teacher bargaining units:

- Added to the objects of OPSTF was the following: "To organize and represent occasional teachers teaching in public elementary schools in Ontario."
- The definition of an OPSTF member was enlarged to include as a category separate from that of voluntary member: *an occasional teacher member.*
- The following provision was added concerning occasional teacher members:

(a) Occasional Teacher Membership in the Federation [OPSTF] may be granted by the Executive upon the completion of an application for membership form, provided the applicant:

(1) is qualified to teach in the publicly-supported schools of Ontario,  
and

(2) is engaged in an educational capacity as an Occasional Teacher as defined in *The Education Act*, and

(3) subscribes the application fee of \$1.00 with the application, which fee shall be returned if the application is rejected.

(b) The duties, privileges and responsibilities of an Occasional Teacher Member shall be the same as those of Statutory Members.

(c) An Occasional Teacher Member shall be a Member of the District or Districts in which the Occasional Teacher is engaged to teach. (Exhibit No. 334(b): OPSTF: *Unionization of Occasional Teachers Organizer's Manual*).

I do not suggest that FWTAO in any way should follow the organizational lead of OPSTF (or OECTA, or OSSTF) regarding occasional teachers. As an Affiliate, it has the full right to take the position which it has articulated for occasional teachers. My point goes back to the claim of FWTAO that, as an organization, it is a special program for women public elementary school teachers within the meaning of section 14 of the *Human Rights Code*. How can it be such a program if there are identifiable groups - indeed, disadvantaged groups of women teachers - who are excluded from the *decision-making processes of the organization*?

It will not do to argue that occasional teachers are not included within the definition of teachers under Bill 100, and therefore there is no obligation upon FWTAO to bring them within its fold as contributing *voting members*. The uncontradicted facts

are that FWTAO has been formulating policy *specifically directed toward occasional teachers and yet these teachers are not a part in the making of such policy.*

## E. The Origins of the Affiliates with Special Reference to FWTAO

Now, however, let me begin to describe what I have called the origins of the Affiliates. This is done, as I noted earlier, to provide a deeper contextual analysis to the claim by FWTAO that as an organization from its inception it has been equality-seeking.

With few exceptions, the historical evidence leading up to the *Teaching Profession Act* of 1944 in Ontario was archival. For example, there was substantial evidence from Dr. Florence Henderson, a former Executive-Director of FWTAO, concerning her understanding and interpretation of two histories relating to FWTAO found in that organization's archives. She was permitted to testify concerning those histories as well as other archival material found at FWTAO.

Dr. Henderson was not qualified in a technical sense as an expert. But, there can be little question that the depth of her experience as an educator in Ontario, her professional association with OTF and FWTAO, and her formal education provide a rich basis for probing and understanding the development of education in this province and especially the development of associations of women elementary school teachers. (Tr. Vol 18, at 2035).

Dr. Henderson was graduated from grade 13 in Ontario in 1942, and from the North Bay Normal School (a predecessor to what became known as a Teacher's College) in



1943. This allowed her to begin public elementary school teaching that same year. As was the rule at the time, the teaching certificate became permanent after teaching for two years and having taken five approved summer courses. (The rule at the time also permitted students graduating from grade twelve to become enrolled in what in effect was a teacher's college. The greater number of elementary school teachers did just that: They went from grade 12 to teacher's college, and thence to a teaching position. This condition was later changed to require a grade 13 diploma, and more importantly in 1972 an undergraduate degree for admission to teacher's college. An effect of the university degree requirement was to create another conflict within FWTAO between those who held such degrees and those who did not. This was discussed in Part I of the decision.)

Like most new elementary teachers, the larger number of whom were women, Dr. Henderson's first job was in a rural area. It was located in Barr River. It consisted of one room, and was attended by 29 students ranked from grades one to nine. Dr. Henderson taught at the Barr River school for two years. She then moved to public elementary school teaching in Sault Ste. Marie. In 1957, Dr. Henderson obtained a Bachelor of Art's Degree from the University of Western Ontario. The process of furthering her formal education while teaching full time bespeaks of dedication frequently manifested by Ontario teachers. (It also speaks of finding time in a busy schedule for such study.) Dr. Henderson testified:

That degree was taken extramurally and was even somewhat different from extramural courses. It was similar in that the teachers from Sault Ste. Marie came down to London, where I was taking the degree in the summer. In the winter we studied on our own. A professor came up

just before the examination, and we took the examinations that way.  
(Tr. Vol. 18, at 2139).

Dr. Henderson's formal education, as her title indicates, continued. I will only summarize here the degrees she received: After taking two summer courses in Toronto at what was then the Ontario College of Education, she received the Degree of Bachelor of Education. This was followed by four more extramural courses at the Ontario College of Education. This resulted in the Degree of Master of Education. And, in 1975, she was awarded the Degree of Doctor of Education from the University of Toronto.

All told, Dr. Henderson served as a public elementary school teacher for about twenty years. During that time she was active in the FWTAO, whose origins and development shortly will be set out. Then, in 1968, she began a professional relationship with FWTAO. She worked as Executive Assistant for FWTAO from 1968 to 1972, and she was Executive Director from 1972-1985. Even predating her position as Executive Director of FWTAO, Dr. Henderson was a member of the OTF Board of Governors (1963-1967). And she was a Governor and a member of the OTF Executive during her tenure as Executive Director of FWTAO. (From 1981 to the time of her testimony she also was a member of the Board of Governors of the Ontario Institute for Studies in Education.) (Ex. 109.)

In reaching for and obtaining advanced degrees leading to her doctorate, it is fair to say that Dr. Henderson was not typical of most public school teachers, including most female elementary school teachers who, at the time, as I have stated, were not required to have an undergraduate degree in order to take a permanent teaching

assignment.

In any event, Dr. Henderson stated that women made up by far the largest largest number of public elementary teachers. By 1919, 11,359 of the 12,445 public elementary school teachers in Ontario were women. (Tr. Vol. 18, at p. 2183.)

Until as recently as the 1960's, the separate school system had a preponderance of women both as principals and as teachers, a large percentage of whom came from religious orders. Indeed, at one point, all but 49 of an estimated 3,000 separate school teachers were women. (See, testimony of Douglas Knott, a teacher and a principal in the Roman Catholic Separate School Boards of Windsor and Metropolitan Toronto from 1959-1971, and in 1975 Deputy General Secretary of OECTA, Tr. Vol. 14, at pp. 1634, 1654-1656, 1755-1760.)

Even before the formal organization of FWTAO on April 3, 1918, there were a number of associations of women elementary school teachers. Dr. Henderson stated:

There were women teachers' associations existing in places like Toronto, Ottawa, Galt, Hamilton and London. And these were small groups of women, elementary teachers who had gathered together to deal with problems which they felt could not be resolved if, in some fashion or another, they did not take things into their own hands. (Tr. Vol. 18, at 2176).

Indeed, in a 1969 study commissioned by FWTAO, *The Shortest Shadow: A Descriptive Study of the Members of the Federation of Women Teachers' Associa-*

tions of Ontario, (Ex. 126), Shirley Stokes, an FWTAO Executive Assistant, pinpointed the year 1888 as the time when a group of eight women formed the Lady Teachers' Association of Toronto, quickly followed by an association in London. (*Id.*, at p. 85.) (There will be further references to this study, which will hereafter be referred to as *The Shortest Shadow*.)

Dr. Henderson then proceeded to describe the concerns that could not be resolved without organization by and for women elementary school teachers. And, in the result, these concerns became objectives of the soon to be established FWTAO, objectives which Dr. Henderson said continue today. But, before setting out those objectives, it is important to note the context in which those concerns found expression: By and large, they related to full-time public elementary women teachers, though it should be noted that after OECTA was established in 1944 as many as 300 of its members had the right and chose to remain members of FWTAO.

Dr. Henderson outlined the central concerns of the women elementary teachers' associations that became the core of FWTAO:

There were really five areas that appeared to concern them at the time: the lack of equal pay for men and women; the lack of opportunity for promotion for women within the school system; the lack of opportunity to have women in the other educational associations which were in existence at that time in any representative fashion, such as the Ontario Education Association; and the right to represent themselves before the school board when presenting their own salary needs. At the time that they formed these associations, the



[school] boards refused to meet [with] the women, and said that any request they had must be brought through the men teachers.

They were concerned about the . . . differences that were placed upon women when they became married, and they were concerned about retirement and about job security. . . . (Tr. Vol. 18, at 2178-2179).

Yet, as to the "concerns" expressed by Dr. Henderson, it would be wrong to believe that women elementary teachers, even in the years before 1918, were as one in the identification and furtherance of all important interests affecting them. That they were a constituency sharing much in common, there is no doubt. That as a constituency some interests of vital sub-groups were forced over a period of years to yield to a more dominant majority of women, there also is no doubt.

One example, mentioned previously, concerns elementary school teachers who were married. Another example, which also was developed in Part I of this decision, relates to those teachers who did not hold a university degree, and still another concerns occasional teachers.

In any event, FWTAO was established as an organization on April 3, 1918. The objects of the Federation, as recorded in the minutes of the meeting of that date, were: " . . . (a) the formation of local women teachers' associations, and (b) the promotion of the professional and financial status of women teachers." Recognizing that these are only *objects* *provisions*, still by their words they only indirectly touch the concerns expressed by Dr. Henderson.

Yet, even as to the broad goals set out, there appeared to be far from unanimous acceptance by the membership who approved the establishment of the Federation. Ms. Stokes in *The Shortest Shadow* said that while history confirmed the twin goals of promoting "the professional and financial status" of women teachers, "financial status was only included after a strenuous debate in case it prejudice the image of the service aspect of the occupation." (*Shortest Shadow, supra*, at p. 85. See also, the testimony of Dr. Henderson, Tr. Vol. 18, at p. 2185.)

About three years later, on March 11, 1921, FWTAO was incorporated. (Ex. 111). The organizational objects enacted at the establishment meeting were revised for its incorporation. It was the view of Dr. Henderson that the basic objects were not so much changed as enlarged. (Tr. Vol. 18, at p. 2181). The corporate objects were:

- (i) the formation of local women's teachers' associations for the promotion of the professional, literary and social interests of women teachers;
- (ii) the promotion of the professional and financial status of women teachers;
- (iii) the promotion and fostering of a spirit of professional etiquette among teachers. Members shall be required to refrain from underbidding, from speaking slightingly of other teachers and to adhere to the salary schedule determined on from time to time by the Federation;
- (iv) to stimulate public interest in our work by conducting educational propaganda through the press;

(v) to formulate and direct any united efforts on the part of the women teachers of the province, and

(vi) to cooperate with other bodies of organized teachers.

Dr. Henderson said the objects of FWTAO today "in general terms . . . are not substantially different [than they were in 1918 or in 1921]." (Tr. Vol 18, at 2188). It may be that the objects set out in the establishment and incorporating documents were intended to encompass the specific concerns delineated by Dr. Henderson as those of women elementary school associations before 1918. But, on the face of the language in the documents, they seem to speak to broad professional and financial goals.

Extracts, drawn from the then newly-formed FWTAO minutes, were read into evidence by Dr. Henderson. They were intended to provide illustrations of the organization's efforts toward becoming an advocacy equality-seeking agency for women elementary teachers. At the founding meeting on April 3, 1918, the minutes record:

The newly elected President then took the Chair and Miss Adkins from St. Thomas gave a paper on *Why are women, with the the same training and qualifications as men, relegated to the less remunerative positions?*

Dr. Henderson concluded: "So, it was clear that that was uppermost in the minds of the women who gathered at the meeting." (Tr. Vol. 18, at 2189.)

Other examples, noted before, were offered. At a 1920 FWTAO meeting, Ms. A.E. Marty, Inspector of Public Schools in Toronto, spoke on *What We Owe to Our Profession and What It Owes to Us*. She said:

The principle of equal pay for equal work to men and women should be recognized and the preferred positions in the profession should be open to women on equal terms. (Tr. Vol. 18, at 2191.)

FWTAO records, as was indicated, show that about the time of its founding by far the preponderance of public elementary teachers in the province were women. In 1919, there were a total of 12,445 public elementary teachers in Ontario. Of these, 11,359 were women. Slightly more than 1,000 were men. More than 90 percent of elementary teachers were female. (Tr. Vol. 18, at 2183.) Doubtless these percentages in no small measure reflected dislocation of men who had been serving in the military during World War I. (Bearing in mind the general statistics relating to elementary positions held by gender, I have assumed that a large portion of those designated as male elementary teachers were in fact principals.)

For teachers, both female and male, this was a time of transition. In 1919, the Ontario Secondary School Teachers Federation, a mixed gender group, was founded and a year later what was then called the Ontario Public School Men Teachers' Association was established.

Dr. Henderson was asked why there was "such a flurry of [organizing] activity." She answered:



I think there were a number of reasons. I think that as far as the women were concerned, the war was over. In 1918 the war was over. The women had done a great many of the things in the schools that had normally been done by men, when the men had gone off to war. And, so I think that they [women] were beginning to develop a sense of confidence in their own ability, and were prepared to take a stand and to organize in this fashion. They had also been very much involved in organizing activities during the war, in terms of shelter for children from Britain, organizing fund-raising for the war and so on. And, I think they saw in themselves the kind of organizational ability that they felt could be used to good purpose in terms of looking after their own interests.

As far as the men were concerned, many of them came back from the war with the feeling that unless salaries and working conditions improved in the schools, they were not prepared to return to that kind of occupation, and that it was their hope to improve those factors. (Tr. Vol. 18, at 2185-2186.)

FWTAO led evidence through Dr. Henderson which suggested that from the very beginning male elementary school teachers were not to become part of FWTAO. From the minutes of an FWTAO meeting in 1920, the following motion was put and passed:

It was moved by L.L. Green and seconded by Miss Pettit that we have separate federations of men and women teachers and that

we cooperate by means of a central committee.

However, in the previously-mentioned *The Shortest Shadow* - an FWTAO publication specifically designed and subtitled as a descriptive study of the members of the organization - its author, Shirley Stokes, wrote at p. 85: "At an early stage of the new federation's history, the women invited the men to join them but this invitation was firmly refused." (Ex. 126.)

Still, whatever might have been the beginnings of FWTAO, it is clear that it early became and remained exclusively an organization for women elementary school teachers.

Having sketched the objects of FWTAO, as they were formally recorded, and extracts of minutes relative to the direct concerns of its members, it may be a useful exercise for there to be a comparison of FWTAO with OSSTF, which was founded as a mixed gender organization. I do this not to suggest that the comparison be made with a view toward determining who has better served its female members. Rather, it is done to place in a more realistic perspective FWTAO claims concerning its advocacy of the interests of women teachers and, in that regard, FWTAO's position that such an equality-seeking organization can best (indeed, it may *only*) be carried out by a women-only organization.

The facts are that the objectives of OSSTF at its founding were not dissimilar from those of FWTAO. They, too, were framed in broad terms. (See, Ex. 643(a).) Perhaps more to the point were extracts of minutes taken from OSSTF archives, and introduced by Mary Templin, a member of the OSSTF Secretariat. At the founding

meeting of OSSTF, the following was recorded:

Moved by Miss Muir, seconded and carried *that the principle of equal pay for equal work be formally adopted into the general policy of this Federation, and that the adoption of this policy be at once made public through the press.* (Ex. 644).

And, in fact, the press was made aware of the policy. A story reporting the policy appeared the next day. This was not an isolated example. (See, Tr. Vol. 75, at pp. 10012-10013.)

What has been stated is not to suggest that OSSTF early in its development was a bastion for the rights of its women teacher members. Indeed, when one examines the list of elected officers at its organizational meeting, *all* of those nominated and elected were male. The point is, however, that there was a sensitivity and response by OSSTF membership to concerns of its women members. And, as the facts will show, that response and concern has enlarged and been actualized over the years.

From its establishment - indeed, as Dr. Henderson testified, before 1918 - the predecessor organization to FWTAO strove to gain what are now called *positions of added responsibility* (PAR). Moving from 1918 to the 1930's and 1940's, but before the 1944 *Teaching Profession Act*, Reginald H. Soward, a Toronto lawyer, and the first witness of OTF offered some direct experience and testimony as to the conditions faced by women elementary school teachers in that later period. (Tr. Vol. 9, at p. 981).

Mr. Soward, a former trustee for what was then North York's only collegiate

institute, Earl Haig, and later Chair of the Board of Trustees of Wycliffe College, served as early as the 1930s and 1940s as an advisor and lawyer to individual women elementary school teachers as well as the FWTAO, itself. (To a lesser extent, Mr. Soward also acted as an advisor to male elementary school teachers and secondary school teachers.)

Initially, Mr. Soward's activity seemed directed toward female teachers who were the object of actual or potential professional discipline. Later, he tended to offer advice, especially to the Deputy Minister of Education in the early 1940s. (The ministerial portfolio was held by the Premier.) In part, that advice resulted from problems presented to Mr. Soward by some of the women elementary school teachers. In particular, he spoke of the lack of principalships awarded to women elementary school teachers. Mr. Soward testified:

I particularly was made aware and it was brought home to me, although I knew as well that rarely was a public school woman given the responsibility of being the principal of the school in which she served. Many times women told me that their particular candidate was a better teacher and had more ability, but a man was given the role, and I think that went on for many years. And the women were very critical of the fact that they did not think they got the promotion that their ability and their learning entitled them to. So I was aware of that. . . . (Tr. Vol. 9, at 988-989.)

...



[O]ne of the reasons given [for not promoting women to positions of principal was] that when trustees appointed a principal they expected him to hold the office until he reached the age of retirement, and that could not be so in the case of women in the event of pregnancy and children. (Tr. Vol. 9, at 990.)

Mr. Soward might have added, and the record leaves no doubt in this regard, that women elementary school teachers experienced significant discrimination in finding, keeping, and advancing in their jobs as well as earning comparable incomes to their male colleagues. None of those appearing in this litigation dispute these points. What was true in 1918 remained true in 1944. Only in terms of the past several years can it be said that some major inroads have been made along the route toward greater equality.

## **F. Mandatory Teacher Membership**

From 1918 to 1920, three *independent teaching federations, resulting in part from local groups*, were established in Ontario. They were *voluntary associations*.

Membership was not required as a matter of law, nor otherwise as a condition of employment. From 1918 or 1920 to 1944, the three independent and voluntary organizations functioned and their influence began to be felt by government. In that time, they obtained some success in enlisting teacher members. OPSMTF had enlisted about 67 percent of male elementary school teachers in its federation; FWTAO, 45 percent; and OSSTF, more than 90 percent. (Tr. Vol. 9, at pp. 1034-1035, Testimony of Mr. Soward.)

There are a number of reasons for the different membership rates:

- Elementary school teachers, especially women, often were located in rural areas making communication by a group with them somewhat difficult.
- By a margin of about 2/1, elementary school teachers were women. There simply were far more persons to contact than with the other two federations.
- More than a third of the male elementary teachers were principals.
- The high schools, or secondary schools, generally were located in urban areas where there were larger clusters of teachers available for discussion.

Whatever might have been the number of members enrolled in the voluntary federations, and however their then growing influence might have been perceived, there were two limitations on their power which should be stated, and given some emphasis, for these limitations had a real bearing on the shape of the 1944 legislation, the *Teaching Profession Act*, as well as many laws later enacted and the structure of OTF:

- In the early years, at least, the cost of membership was not steep. Consider OSSTF where, as indicated, more than 90 percent of all Ontario high school teachers had become members. At the founding meeting, the membership voted on guideline minimum salaries which ranged, depending on whether the high school was a continuing school, a rural collegiate institute, or a city collegiate institute, from \$1,300 to \$2,000. At the Dec. 28, 1920 OSSTF

organizational meeting, a vote was taken and carried to increase annual dues from \$3.25 to \$5.00. Of that total, \$3 was to go to the provincial executive and \$2 to the district or local executive. (Ex. 644.)

Granted there were important differences between the 1920's and the 1990's. In earlier times, it was probably easier and less costly for teachers and their representatives to liaison with government, department of education officials and local boards of education. Yet, how radically different it is to compare a federation budget in the 1920's of at most several thousands of dollars, and a support staff of only a few, with the budgets today of FWTAO, OPSTF, and OSSTF, as well as OECTA and AEFO, not to mention OTF, ranging in the millions of dollars and support staffs of large numbers, highly professional and relatively well paid.

- To keep existing members and enlist new members took time, and we can assume that it also took money. How were the new federations to get about their other business, the very rationale for their establishment, namely, the well-being of teachers and through them education in the province?

It followed that so long as membership was voluntary, there were limits to the organization's capacity to increase the amount of dues. Today annual dues for full-time statutory teachers, on the whole, can be in excess of \$600.

One rather clear solution for more effective teaching federations surfaced: automatic membership in the *appropriate* federation. (Tr. Vol. 9, at 1034-1036.) This meant that teachers would be compelled to become members of the federation which, at the

time, seemed most appropriate in terms of representing them.

A way to achieve that end, indeed perhaps the most effective way, was by means of legislation. That is, what we might call *special automatic membership laws* for each relevant federation would be enacted. Mr. Soward, it appeared, was the person designated by FWTAO to sound out the Ontario government of the day. Not only did he have a close relationship with the Deputy Minister of Education (Dr. Dunlop), but he also had such a relationship with the then Premier (Mr. Drew). The judgment Mr. Soward received and passed on to FWTAO was that the government would look favorably on proposed legislation that would embody automatic membership. But, the government was emphatic that there would be only one umbrella organization encompassed by such legislation. There would not be individual legislation for each of the then existing or to be formed teaching federations. Mr. Soward testified:

Q. Well, sir, taking into consideration these concerns that, for example, the women had, did you have any part to play in any communication to representatives of the [Ontario] government of there being a separate statute dealing solely with women?

A. Well, it was because of the fact that the women brought home to me that very, very few, I might almost say none of them ever got to the role of principal. And so knowing Dr. Dunlop (Deputy Minister of Education) as well as I did, I tackled him about it and [I] said the women were not getting the treatment that I thought they should get. And, that's when he told me. He said, *There's only going to be one*



*education act passed by the government. And, he said, It will be up to the groups within the Act to form their own separate organizations. And, it will be up to them to bring any pressure that they want to bring on the government. But there is only going to be one Act.*

Q. Were you asking for there to be a special act for women?

A. Well, I sounded him out. (Testimony of Mr. Soward, Tr. Vol. 9, at pp. 989-990.)

Before Mr. Soward "sounded out" government concerning automatic membership and, in that regard, automatic membership directed as such to specific federations rather than an overall organization such as OTF was to become, the three then existing Ontario teaching federations pointed to the experience of Saskatchewan and Alberta which in 1935 by statute provided for automatic membership of teachers. (Testimony of Dr. Henderson, Tr. Vol. 19, at p. 2204.) This was a kind of precedent to be used in discussions with the Ontario government.

Dr. Henderson seemed to indicate that the timing and need were right for automatic membership in Ontario. A step in that direction came with the formation of the Ontario Teachers' Council, an organization created by the then three teaching federations. Though initially it provided a convenient (and economical) means for calculating dues payments by Ontario teachers to the Canadian Teachers' Federation which had been established in 1921, it also provided a forum for discussing common concerns. (Tr. Vol. 19, at 2205, Testimony of Dr. Henderson.)

(It cannot be assumed that the Teachers' Council was a strong, independent organization. Rather, it functioned at the sufferance of its three supporting federations. This is not to deny that the Council did try to improve the lot of teachers in discussions about salary, pensions, and general conditions of work with officials of the Department of Education. Yet, a major OTF publication, *Pattern for Professionalism* (1968), Ex. 50, puts the Council in a more realistic perspective:

But the Council was limited in its scope and its powers. It did not include the separate school teachers; it lacked legal status; it had limited financial resources (as was evident from the year-end bank balance of \$8.73 in 1936). (See, *Pattern for Professionalism*, at p. 2.)

It was the view of the three federations, and there was no disagreement, that the time had indeed come for automatic membership. By 1942, Manitoba and New Brunswick were added to the provinces that so provided. A common document to the three Ontario teaching federations was prepared, according to *Pattern for Professionalism* at p. 2, by the Ontario Teachers' Council, with the help of the Deputy Minister of Education under a Liberal government. It was the Deputy Minister's intent, later re-enforced by a newly elected minority Conservative government under Premier George Drew, that the draft law be forwarded to all Ontario teachers for a vote of approval or disapproval. This was done. (Ex. 112(a).) The document set out a proposed law to be enacted by the Ontario legislature, the rationale for it, and arguments for and against its adoption.

The impetus for the proposed law was the sense, certainly of the leadership of the three federations, that a great deal had been done on behalf of all teachers without

regard to whether they were members of any of the three federations. It was, in the view of the three federations, unfair for the non-members to remain uninvolved and not to pay their fair share. The document recited what the federations had achieved since their establishment:

A 62 percent membership for all teachers on [the] Ontario Secondary and Elementary [panels] has given the Ontario teachers:

An \$800 minimum [wage] that we hope will be increased to \$1,000 this year; improved contract legislation giving greater protection to all on new contracts since June 12th, 1943; a Board of Reference Act for those in difficulty with their boards [such as disciplinary action]; improvement in [the] Superannuation Act [pensions]; improvements in Course of Study; and higher standards for teacher certification. . . .

Is it ethical to accept all these benefits and others not listed, without paying one's share of the expense? (Ex. 112(a), at p. 3.)

The document stated that beyond paying for benefits received, automatic membership (a) would enhance the voice and the power of the teachers, through their federations. The Ontario Teachers' Council would be enlarged into a new kind of organization. (b) And, instead of spending time and money on recruiting new members, those savings, coupled with additional funds, would allow for a greater range of programming such as:

- promoting and advancing the cause of education;

- raising the status of the teaching profession;
- promoting educational research;
- arousing and increasing public interest in education;
- securing for teachers a greater influence in education affairs;
- travel fellowships;
- a better magazine;
- better meetings;
- adequate office staff and accommodation;
- bringing together leaders of educational thought concerning such problems as child delinquency, child labour, and citizenship.

Finally, with professionalism would come a heightened sense of individual teacher responsibility through a code of ethics. Yet, it should be noted that the first and only specific item noted for such a code that would be enforceable against teachers was the elimination of under-bidding for employment contracts.

The document, as stated, included the substantive terms of what would go into the new legislation to be called the *Teaching Profession Act*. Much of that proposed, in the result, was accepted and enacted by the Ontario legislature in what is known as the *Teaching Profession Act*, Ch. 64, Ontario Stats., assented to April 6, 1944.

I pause here to note that the reasons advanced for and against the Act were those set out by the federations at the time in their correspondence with teachers. In *Pattern for Professionalism*, however, the OTF study group put a gloss on the reasons earlier advanced to teachers and some additional reasons which, in my view require repeating because they have some bearing on the issues presently before me, the



most important of which at this point might be the reasons for separate elementary school federations based on gender.

The following is stated in *Pattern for Professionalism*. (As one reads this extract, bear in mind that another World War was about to end. With this would come major economic dislocation, not dissimilar in kind that gave rise to the establishment of the three federations between 1918-1920):

The need for a professional act became more acutely apparent during the war years, 1939-1945. The lack of status for education itself, which too often was at the bottom of the list of priorities in civic and public improvements, caused widespread dissatisfaction among teachers and and many of the general public.

Furthermore, the definite uneasiness which teachers felt concerning the aims and achievements in education, pointed up the need for a thorough evaluation of goals and procedures.

Added to this, many teachers were inclined to think of themselves as second-rate citizens. Something had to be done to give the vocation a lift.

These feelings, vaguely felt at first, were strongly and alarmingly confirmed by many teachers serving in the armed forces. It came as a shock in some cases to find how definite some of these veterans were in their resolve not to return to teaching in Ontario. Their complaints

were against the status of education, general teaching conditions, a lack of true appreciation on the part of the public of the very difficult art of teaching, and finally, the very inadequate salaries.

Officers of the three federations were very greatly concerned lest the breadth and depth of experience of these veterans should be lost to the teaching strength of the province.

The three federations knew that they had a definite responsibility to assist in formulating educational policy in the province. They felt that they had not been doing so and were keenly anxious to begin to remedy that unsatisfactory condition.

In the midst of the professional unrest, a new factor appeared. In one large city there was a definite movement afoot to try to organize teachers, particularly the men, into labour unions. A labour union organizer was very active, and in some respects seemed to making headway. Federation officials had their plans for a professional act well underway and were quite convinced that their own welfare did not lie along paths of joining a labour union when labour's own ranks were torn apart by competing unions. Moreover, federation officials looked with complete disfavour upon any scheme for the future which would separate men and women who worked side by side each day in a school's classrooms. Any alleged advantages of joining a labour union were set aside when compared with an act which would recognize teaching officially. As a profession, federation officials

pressed for an Act. (*Pattern for Professionalism*, Ex. 50, at p. 2.)

Bearing in mind that it is an OTF history, and not one of the federations or of government, there are three points derived from the extract quoted: (1) Negotiations leading to the draft act were between the Teachers' Council (albeit a weak organization dominated by its three federation founders) and the then Department of Education. (2) There was concern that organized labour might launch a serious organizing effort to enlist teachers. (3) One of the real dangers seen in such an organizing effort was that, if successful, it would "*separate men and women who worked side by side each day in a school's classrooms.*"

These are not the concerns of a government or a teaching federation that are directed primarily toward equality-seeking goals, as such. Rather, they seem to be the concerns of professionals directed toward the enhancement of their vocation, teaching.

In any event, the *Teaching Profession Act* marks the establishment of the Ontario Teachers' Federation and with it *automatic membership*. The nature of that legislation will be described in more detail shortly. For now, it will suffice to note that the federations made their members aware of a proposed law, the arguments for it, and, to an extent, some of the concerns of those doubtful about the propriety of such a law. It probably is fair to say that those concerned about the proposed law questioned that democracy - meaning freedom of choice - might be taken away from them.

The answer in part given by the federations was that with freedom comes

responsibility to the whole. And, in any event, as the new law permitted following the proposal of the federations, those already serving as teachers could in writing decline membership in the OTF. Then, there were the concerns of others who felt that the proposed regime might bring with it an entrenched and autocratic administrative apparatus. To this, the federations answered that fair rules, fairly administered, should keep the administration responsible. Finally, there was a fear that the organization might be taken over by larger bodies. This will not happen, the federations replied, so long as the teachers themselves produce good leadership and cooperate with those leaders.

In any event, out of the document and discussions which followed, a referendum among all Ontario elementary and secondary teachers was held in 1943 to determine their position in relationship to the proposed legislation, and specifically the provision which would compel membership in it. This was done at the request of the Premier who - as earlier indicated by Mr. Soward, and according to Mr. Knott, former Deputy General Secretary of OECTA - was "responsive to the idea of the OTF provided it represented all of the teachers in public education in Ontario. . . ." (Tr. Vol. 14, at p. 1637.)

Strenuous efforts were made to have all teachers vote, including the sending of second letters to those eligible who had not yet exercised their franchise. (Ex. 113.) FWTAO with the largest number of members (12,003) voted 6,611 in favour, and 438 against; OSSTF with 4,901 members voted 3,580 in favour and 361 against; OPSMTF with 2,204 members voted 1,319 in favour and 138 against. (Ex. 113.)

Close in time to the enactment of the *Teaching Profession Act*, two other federations



were recognized: AEFO and OECTA. Indeed, AEFO predates the establishment of FWTAO. In effect, it was founded in 1916 through the French Canadian Association of Education in Ontario. (Tr. Vol. 13, at p. 1544, Testimony of Prof. L. Bordeleau). AEFO was seen as an important way to develop the French community in Ontario as it was then constituted. In 1944, however, French teaching, as contrasted to teaching French courses, was confined to some grades in the elementary schools and private schools. (French *courses* were taught at the secondary level.) (Tr. Vol. 13, at p. 1545.) Also, there was a close link between education in French and the operation of many separate schools. (There, not infrequently, the instructors were Sisters in religious orders.)

OECTA was established in 1944. The legislation of that date provided an opportunity for the organization which had been operating in a number of local areas to coalesce. Mr. Knott, Deputy General Secretary of OECTA, said at the time of its organization, that those who would be covered by OECTA had the choice of joining any of the other OTF affiliates. (Tr. Vol. 14, at p. 1637.)

The first provincial meeting of OECTA was held in February 1944, in Ottawa. At that time, a draft constitution was prepared and interim directors were elected. In April, 1944, at a meeting of teachers in Toronto, the constitution was ratified and the election of directors took place.

## **G. The Nature of OTF, Its Governance, and "Democratic Procedures"**

History tends to demonstrate that if AEFO and OECTA, along with FWTAO, are to be characterized as *equality seeking organizations, they do not stand alone in that*

*regard*. Indeed, in terms of the designation of affiliation for the purpose of statutory membership, there is no small question as to whether what I shall call compromises in the course of time in relationship to the shape and nature of the OTF By-Law relating to statutory membership had more to do with organizations living in harmony with each other as organizations than that which made for valid membership designation in terms of furthering equality-seeking principles. In fact, I accept the characterization given by the OTF study, *Pattern for Professionalism*, 1968 (Ex. 50) dealing in any significant way with the relationship between federations and as between them with the OTF, at p. 59:

The greatest force that stimulated the formation of the Federation [OTF] was the need for recognition from the Department [of Education]. A voice was granted to the teachers in 1944, not on the basis of professional status, but rather on the basis of the fact that they [OTF] represented 20,000 teachers.

The founders of the Federation [OTF] obviously chose this strategy as the most rational means of achieving professional recognition. Consequently, the tendency to *ritualize* (a sociological expression) the need for unity has been internalized into the structure of OTF. . . ."

The 1944 law technically is called *An Act to Provide for the Establishment of the Ontario Teachers' Federation*. I emphasize this because it is the entity of the Ontario Teachers' Federation (OTF) which is established by law as a body corporate. (§2) There is in the Act no direct reference to the existing federations, although the first Board of Governors, totaling 16 persons, individually designated by *name and not*

*affiliation*, were in fact drawn from the then existing federations. (§11).

Most important for our purposes: the goal of automatic or compulsory membership was achieved. Note, however, *under the Act*, that membership was to be in the OTF.

Section 4 of the Act provided:

Every teacher shall be a member of the Federation [which the Act in §1(d) defines as the Ontario Teachers' Federation], provided that a person who is a teacher at the time of the coming into force of this Act may withdraw from membership by notifying the Minister and the secretary of the Board of Governors of his withdrawal by registered letter posted not later than six months from the coming into force of this Act.

(In point of fact, less than 200 teachers elected to withdraw from membership in OTF. Many of those who did withdraw later became members. Apparently, their choice was not irrevocable. (Ex. 45, Tab. 1,, at p. 3).)

That same compulsory provision has been continued in the Act, as later amended.

The objects of the legislation set out in 1944 also have been continued intact. In substance and scope, they are not dissimilar from the objects of the then existing federations:

§3. The objects of the Federation [OTF] shall be -

- (a) to promote and advance the cause of education;
- (b) to raise the status of the teaching profession;
- (c) to promote and advance the interests of teachers and to secure conditions which will make possible the best professional service;
- (d) to arouse and increase public interest in educational affairs; and
- (e) to co-operate with other teachers' organizations throughout the world having the same or like objects.

The governance of OTF was placed in a Board of Governors, which was not to consist of more than forty persons. (As noted, the members of the first Board of Governors were named in the Act.) (§5). The Executive was to be composed of a President, Immediate Past President, First Vice-President, Second Vice-President and Secretary and Treasurer. Their election or appointment was to be annually by the Board of Governors. (§6).

To carry out its objectives, the Board of Governors was to meet at least annually with the Minister of Education and senior officials in the then Department of Education. There the Board could make recommendations either of a general or a specific nature. (§8).

The power of OTF went beyond discussion and recommendations. It could make regulations, subject to the approval of the Lieutenant-Governor in Council. I have



italicized those provisions which are, in my view, most relevant to the issues in these proceedings:

§ 10. Subject to the approval of the Lieutenant-Governor in Council, the [OTF] Board of Governors may make regulations, -

(a) *prescribing a code of ethics for teachers;*

(b) *prescribing the fees to be paid by members of the [OTF] Federation;*

(c) *providing for the suspension and expulsion of members of the [OTF] Federation and other disciplinary measures;*

(d) *prescribing the manner in which the members of the Board of Governors shall be selected;*

(e) providing for the holding of meetings of the Board of Governors and of the Executive and prescribing the manner of calling and the notice to be given in respect of such meetings;

(f) *prescribing the procedure to be followed at meetings of the Board of Governors and of the Executive;*

(g) providing for the payment of necessary expenses to the members of the Board of Governors and the Executive;

(h) *conferring powers upon or extending or restricting the powers of and prescribing the duties of the Board of Governors and the Executive;*

(i) *providing for the appointment of standing and special committees; and*

(j) *providing for the establishment of branches of the Federation or of the recognition by the Federation of local bodies, groups or associations which shall be affiliated with the Federation.*

Section 10(b), as noted, required the OTF to prescribe the fees to be paid by its teacher members. (And, except for those teachers who had been grandparented by the 1944 law, that meant the OTF would set fees for *all those legally qualified to teach in public, separate, continuation, high schools, collegiate or vocational institutes in Ontario*. [§1(h)].) Section 9 provided for what may be called a mandatory dues check-off at source:

§9. The prescribed membership fee shall be deducted by the [school] board of trustees from the salary of each teacher for the month of November or for the first month thereafter in which the teacher begins a term of employment and shall be forwarded to the treasurer of the Federation [OTF].

The first Board of Governors, exercising its power to make regulations, designated the five federations as affiliated with the OTF and they were to be known as

*affiliated bodies* of the OTF. (Tr. Vol. 9, at pp. 1063-1064). The *Teaching Profession Act* was amended in 1947 in a way that formalized the five-Affiliate control over the governance of OTF. This was done by denoting the five Affiliates as the constituent members of the OTF Board of Governors. Regardless of membership size, each Affiliate in the result was given an equal number of positions (ten) on the OTF Board of Governors. (Initially, AEFO and OECTA had five members each because of their deemed community of interest. Later that number was changed to a right to ten members each on the Board of Governors.) Similarly, to ensure equal Affiliate power there is, in effect, equal representation on the OTF Executive which makes decisions on a day-to-day basis between meetings of the Board of Governors.

Margaret MacDonald Wilson, Secretary-Treasurer of OTF since 1985, a member of the OTF Board of Governors from 1976-1984, and President and Chief Negotiator for OSSTF, District 15 (City of Toronto) from 1974-1977, offered this description of the OTF Board of Governors and Executive. (Ms. Wilson was appointed to her position as Secretary-Treasurer by the Board of Governors. In that position, she is a member of the Executive and she serves as Secretary to the Board of Governors.):

The Executive carries out the business of the [OTF] between meetings of the Board of Governors. The Board of Governors carries out all of the normal routine business of the [OTF]. . . .

It approves the budget, approves the fee of OTF itself, the fees of the Affiliates. It deals with motions of any concern to either Affiliates or individual Governors, or the Executive on a full range of issues relating to education. The Board of Governors also approves the

appointment of the Relations and Discipline Committee . . . a statutory committee which operates under a separate regulation. . . . That committee is one of our major . . . business functions in terms of dealing with the recommendations relating to the retention of a Teaching Certificate where a teacher, for example, has been convicted in a court of law of a criminal offence.

The Executive meets regularly with the Minister of Education. The subcommittee of the Executive [composed of the] secretaries of the Affiliates and the Secretary-Treasurer of OTF meet regularly with . . . Ministry [of Education] officials [who are] chaired by the Deputy Minister of Education. . . . [W]e [the subcommittee of OTF] make representations on behalf of the Federation. . . . (Tr. Vol. 16, at pp. 1948-1949.)

OTF By-Laws XIV, XV and XVI further entrench the individual *autonomy* of the Affiliates by requiring significant enhanced majorities of the Board of Governors to change OTF policies, proposed amendments to the *Teaching Profession Act* and By-Laws. Consider By-Law XIV dealing with policy:

The Board of Governors should do all in its power to reach a agreement in matters of policy and care should be taken to see that sufficient time is given all Affiliates to discuss the proposed policy, in an effort to reach agreement. This having been done,

- 1.(a) An OTF policy may be established or amended only by



three-fourths vote of the members registered at a meeting of the Board of Governors.

(b) The said policy will not be established or amended if, within 30 days subsequent to the Board of Governors' meeting, an Affiliate registers objection, in writing, to the policy.

2. Matters brought up in discussion at a Board of Governors' meeting with the view to establishing an OTF policy, and to which any one or more Affiliates cannot agree, must be referred to all the Affiliates for further study.

3. When matters brought up in discussion at a Board of Governors' meeting with a view to establishing OTF policy are referred to Affiliates for study, the Board of Governors may decide on a time limit for the Affiliates to bring forth their views before vote is taken, as referred to in 1.

4. An OTF policy may be withdrawn by a three-fourths vote of the members registered at a meeting of the Board of Governors, provided that notice of motion has been sent by the Secretary to the secretaries of the affiliated bodies at least thirty days prior to the meeting; or by a nine-tenths vote of the members registered at a meeting of the Board of Governors, a previous notice not having been given. (Ex. 10, at p. 20)

In the result, *there can be no question that OTF is governed by its Affiliates*. It is not governed or otherwise subject to direct controls by the individual statutory members of OTF. This means, in part, that when the term *democracy* is used by those opposing the Complaints as a way of describing the nature and procedures of OTF, *it relates to the institutional members of OTF. It does not relate to the individual statutory members of OTF*. In saying this, I do not mean, as I said earlier, to criticize OTF, as such. I only mean to place matters in context for purposes of this adjudication under the *Human Rights Code*. The responses of Ms. Wilson confirm the points made:

Q. Would it be fair to say that OTF is governed by the Affiliates rather than by its individual members?

A. Yes, the [OTF] Board of Governors is made up of representatives of the Affiliates.

Q. You would agree with me that members of any one particular Affiliate could not change [a] By-Law?

A. Correct.

....

Q. In fact, if every single member of FW[TAO] and every single member of OSS[TF] voted to change the By-Law [on compulsory Affiliate membership] and the other three Affiliates voted against it,

there would be no change?

A. . . . [Y]es, it takes more than one Affiliate to change the By-Law and it takes more than two [Affiliates].

Q. The members of FWTAO and OSSTF put together make up a majority of the OTF?

A. Yes.

Q. But, FWTAO and OSSTF voting together would only be 20 votes?

A. Yes, OTF is a federation of Affiliates.

Q. And, you need 38 [votes], an enhanced majority, to change the By-Law [on compulsory Affiliate membership]?

A. Yes.

Q. There was a resolution put to the Board of Governors [of OTF] suggesting such a vote and that resolution was defeated?

A. Yes. (Tr. Vol. 17, at pp. 2027-2028.)

The Affiliates, as noted, have been given the power to govern OTF. It is true that the *Teaching Profession Act* does not require teachers to be members of an Affiliate.

And, indeed, it is legally correct to state that there really is only one form of *statutory membership and that is in OTF*. Reality, however, is that the five-Affiliate control over the governance of OTF has entrenched the power of the individual Affiliates.

Theoretically, it is possible for new affiliates to be created, such as an organization for visible minorities or one for the physically challenged. Or, there could be a branch established for the representation of teachers in a particular area or those employed by a particular board of education. This power to establish such branches springs directly from the *Teaching Profession Act*, section 12(1). The reality is, however, that this is not likely to happen given the vested power of the individual Affiliates in OTF. (Tr. Vol. 17, at pp. 2032-2038.)

Out of the five-Affiliate control of OTF has come a further division of power. *The Affiliates, by and large, have been given exclusive power to service individual members. OTF generally has the responsibility for liaison with government*, Ms. Wilson testified:

Q. But it is true that most of the matters that concern individual members are handled by and through the Affiliates and not by OTF?

A. The Affiliates provide direct service to individual members at the local level. The Affiliates provide both protective and professional services, that is, professional development as well as collective bargaining services. OTF deals with the government, and *outside of areas where the Affiliates agree that OTF should provide the services*,



for instance, [OTF] will be running a professional development conference in the next school year, and outside of relations and discipline, *OTF is the interlock with the government as opposed to providing direct assistance to individual members.* (Tr. Vol. 17, at p. 2030.)

....

Q. In [the OTF handbook, *We the Teachers*, Ex. 10] it says that by and through the Affiliates that nearly all matters which concern the individual members are handled? .

A. Yes.

Q. You would agree with that?

A. Yes. (Tr. Vol. 17, at p. 2031.)

Thus, OTF is an organization governed not by its individual statutory teacher members, but by the five Affiliates. There is, as was noted before, no direct line of responsibility on the part of OTF to its statutory members. There is a further distancing between OTF and its statutory members in terms of the division of responsibilities set out by OTF and the Affiliates. It is the Affiliates that with some exceptions service individual teachers. So it is that *democracy and democratic procedures as applied to OTF take their meaning.* When, during the course of her testimony, Ms. Wilson spoke of the Affiliate structure vis-a-vis OTF as one intended

to protect minority interests, in my view it might have been more accurate to say that the Affiliate structure protected jurisdictions and interests as they were defined at a point in history dating about a half century ago. (Tr. Vol. 17, at p. 2031.)

FWTAO, pointing to the testimony of Professor Paul Weiler, School of Law, Harvard University, has argued that the Affiliate structure is a "paradigm of federalism."

And, in the use of that term it is clear that FWTAO means *democratic federalism*.

The following is the quoted FWTAO-elicited testimony of Professor Weiler.

(FWTAO brought Professor Weiler forward and had him qualified as an expert in labour law and labour law policy. See, Tr. Vol. 70, at p. 9337. The testimony here quoted relates more to constitutional law, although Counsel for FWTAO in introducing Professor Weiler referred to a number of his Canadian constitutional academic writings. See, Tr. Vol. 70 at pp. 9330-9333. I note that the quotation about to be given was not objected to by Counsel supporting the Complaints.):

Well, it seems to me that one of the virtues of the system of teacher representation that has evolved in this province, partly privately created - partly legally challenged - is that it does try to strike a sensible balance between the two conflicting values that we talked about earlier in defining an appropriate bargaining unit - that, on the one hand, it gives ample room for different constituencies to have a forum in which their special concerns can be voiced [and] at the same time requiring these different constituencies to come together in a broader over-arching organization to develop a common agenda whose internal priorities reflect the views that were originally developed within the different components.

That's the essence of federalism as a concept that has been talked about for three hundred years in political theory and a hundred years or so in industrial relations and other social theory, and what I am instructed - the little that I have read about the Ontario Teachers' Federation's activities - you're [OTF] one of the pioneers in what it seems to me is a real need for the union movement generally in North America. (Tr. Vol. 71, at p. 9524.)

It is no digression to mention again an important study introduced by OTF, *Pattern for Professionalism*, (Ex. 50). The study was commissioned by OTF, itself, in 1965 and it was completed in 1968. The study and its terms of reference were set by resolution of the OTF Board of Governors and approved at the 1965 OTF Annual Meeting. It is fair to say that those constituting the study group, called members of the OTF Commission, were persons who held or were then holding senior rank in either the OTF or one of the Affiliates. And, all of the Affiliates could, in fact, be said to be represented through the Commission members. The purposes of the study were to make recommendations on:

- the structure of the OTF;
- functions of the OTF;
- relationship between the OTF and its affiliates; and
- coordination of internal operations.

In the result, the OTF Commission recommended continuation of the five-Affiliate structure. But, this was not done without significant qualification. While the quotation that follows is somewhat lengthy, in my view it not only puts in context the OTF Commission recommendation, but it also deals with the so-called analogy of OTF structure to democratic federalism. Further, it suggests that statutory membership, at some point, might best be separated from affiliate membership.

The quotation occurs under the heading of the report, *Structure*, and refers in part to the results of a survey of 2,000 Ontario teachers, statutory members of OTF, which took place as they attended upgrade classes in the summer of 1967.

It is not without meaning that the context for the recommendations is that of *individual statutory teacher members of OTF. After all, it is the protection of individual human rights with which we are concerned in this proceeding:*

Opinions gleaned through the teacher survey indicate that the majority of teachers surveyed would prefer a single organization rather than the present affiliate structure, and yet the option of becoming a union or part of the civil service was overwhelmingly rejected. Many people who are not directly associated with OTF are of the opinion that the teachers should be represented through one organization. This is the prevailing structure of other teacher organizations in Canada and was again advocated for Ontario most recently in the Hall-Dennis Report on Aims and Objectives.

The most consistent sources of dissatisfaction which were put before



the Commission centre around the fact that most members have no direct feeling of involvement in OTF and feel that there is a lack of communication with and among members. This dissatisfaction seems an almost inevitable result of the present structure which offers relatively little opportunity for democratic participation in policy making. The parallel with the Canadian constitution, which is frequently used to justify the present structure, is highly misleading. The comparison would be valid only if the government of each province sent some of its leaders to Ottawa to run the Federal government. The lack of effective communication can be explained not only because there is very little printed material made available to the general membership but also because OTF only operates at the provincial level with relatively few active participants who, in turn, are able to communicate with only a limited number of members at large.

It would appear that other organizations that relate to education are reorganizing in an effort to adapt more readily to inevitable change. The Department of Education, boards of education and trustee organizations have reorganized in an effort to become more effective and unless OTF can do likewise, there is danger that other groups may well usurp that which should be the prerogative of the profession.

On the other hand, the present affiliate structure has many virtues. There is no question in the minds of the Commissioners that the diversity manifested through affiliate organization has in many ways

been beneficial over the past years of development. There is a unique quality about each affiliate that needs to be maintained for as long as that quality remains unique. It is not for this Commission to determine how teachers should group themselves under the umbrella of the present organization; this is the prerogative of the teachers themselves and it may be that the composition of present affiliates may change or that new groupings may form. We believe, however, that the present affiliate structure should be maintained until a better alternative evolves.

Representation has been made to this Commission by some statutory members of OTF who believe that their particular function in education does not logically fit them into the criteria for membership set out by the various affiliates. It is the opinion of this Commission that more and more statutory members may find themselves in the same position in the future. OTF has an obligation to these members and perhaps should be so structured that it can encourage their active participation without the prerequisite of affiliate membership.

Although OTF cannot be the sole voice for education in this province, it could be more directly related to other organizations by establishing special councils or associations. These might include associations concerned with specific subject areas, particular age groupings of students, particular roles in educations and so on. These associations would be required to satisfy criteria established by OTF which would provide safeguards and protect the essential unity of the organization,

before they would receive support and the right to become involved in the decision-making process.

In order that the virtues of the present structure be maintained and in an effort to provide for a more effective OTF provincial structure the following recommendations are submitted:

1. THAT THE ONTARIO TEACHERS' FEDERATION BECOME ACTIVE AT THE LOCAL LEVEL.

2. THAT THE ONTARIO TEACHERS' FEDERATION DECENTRALIZE ITS ACTIVITIES BY ESTABLISHING REGIONAL ORGANIZATIONS.

3. THAT THE PRESENT BASIC AFFILIATE STRUCTURE BE MAINTAINED BUT THAT AS FAR AS POSSIBLE THE LOCAL UNIT BE CO-TERMINOUS WITH THE ONTARIO TEACHERS' FEDERATION BASIC UNIT.

4. THAT THE MEMBERSHIP BE MORE DIRECTLY INVOLVED IN POLICY-MAKING THROUGH THE ESTABLISHING OF AN ONTARIO TEACHERS' FEDERATION ANNUAL GENERAL MEETING.

5. THAT THE RIGHTS OF THE AFFILIATES BE MAINTAINED THROUGH REPRESENTATION AT ALL LEVELS OF THE

ONTARIO TEACHERS' FEDERATION. IF THE AFFILIATE MEMBERSHIP SHOULD EVENTUALLY DECIDE THAT THE AFFILIATE STRUCTURE HAD CEASED TO SERVE A USEFUL PURPOSE, THIS MATTER COULD BE RECONSIDERED.

6. THAT OTHER EDUCATIONAL ASSOCIATIONS BE ENCOURAGED TO BECOME RELATED TO THE ONTARIO TEACHERS' FEDERATION. (*Pattern for Professionalism*, Ex. 50, at pp. 21-22.)

The recommendations of the OTF Commissioners, quoted above, help to explain a further response by Ms. Wilson to a question probing Affiliate control over the OTF Board of Governors. Ms. Wilson stated:

[The Teaching Profession Act] made the Affiliate representatives members of the [OTF] Board of Governors. Whether or not the individuals transform themselves in the more general governor[s] of OTF is an individual decision. *The Board of Governors of OTF is more than the sum of its parts. It is the Board of Governors of the Federation [OTF].* (Tr. Vol. 17, at 2032.)

As I interpret Ms. Wilson's statement, the fact that the Affiliates presently control the OTF Board of Governors and, through that power, effectively control the OTF, does not mean that the OTF, as such, needs to be a mirror image of the Affiliates. It is the OTF which the legislature of Ontario has designated as the umbrella organization to which its teachers are statutory members. Law does not assign the



Affiliates any stated function. Nor, as the OTF Commissioners in the quoted extract implied, and Ms. Wilson in her testimony expressly stated, does law either assign or endorse the assignment of statutory members to any Affiliate. (Testimony of Ms. Wilson, Tr. Vol. 17, at pp. 2032-2033.)

OTF properly is a party to this proceeding. It is a corporate entity created by law. In its name and under its authority, By-Law 1 with its compulsory assignment of female public elementary school teachers to FWTAO and male public elementary school teachers to OPSTF was promulgated. And, it is that part of the By-Law which is under attack under the *Human Rights Code*.

And, quite properly, FWTAO has integrated OTF into what it holds forth as a valid special plan within the meaning of section 14 of the *Human Rights Code*. This must be done because FWTAO functions as an affiliate of OTF and receives its statutory members at the present time only by means of OTF By-Law 1. Individual appeals to Affiliate assignment under that By-Law are not, as such, heard by FWTAO; they are heard by OTF.

FWTAO suggests that OTF as a democratic institution has established a fair appeal procedure for any teacher not satisfied with her/his Affiliate assignment as a statutory member of OTF. In that regard, the teacher is permitted to appeal her decision to the OTF Executive who, in turn, can change the designated Affiliate "for a reason." Thus, FWTAO (and OTF) contend a democratic institution has established a fair procedure with broad scope to hear *individual complaints as to Affiliate assignment*.

In the result, the facts urged by FWTAO as they relate to OTF and as they form part of FWTAO's claim to the protection of section 14 of the *Human Rights Code* cannot be accepted. I have already detailed the context in which OTF is to be considered a democratic institution: It is fully responsive and protective of the five Affiliates as organizations. Its procedures insofar as they relate to Affiliate assignment of statutory members are designed and implemented to forward the jurisdictional lines of Affiliate membership demarcation. The appeal procedure for individual teachers as to Affiliate assignment only has meaning for those teachers if the question relates to whether they have been assigned properly within the jurisdictional lines set by By-Law 1 as it is written and interpreted.

There is apparent power to vary the application of By-Law 1 as it relates to member Affiliate assignment. OTF Policy Resolution 1A provides:

Any request to change from one affiliated body to another by a statutory member of the Federation [will] be referred to the Executive of the Ontario Teachers' Federation who in conjunction with the executives of the Affiliates concerned will have the power to change the affiliation of the member *for a reason*. (Tr. Vol. 15, at pp. 1805-1806, Testimony of Ms. Wilson.)

The procedure for such an application involves three levels of decision-making by OTF bodies: the Membership Committee, the Executive and the Board of Governors. Each body essentially has the same composition: It reflects the OTF five-Affiliate structure. The exercise of the vote is not so much an individual vote as one of the organization of which that person is a representative. (Tr. Vol. 15, at pp. 1797-1812,

Testimony of Ms. Wilson.)

The applicant seeking a change of affiliation is given the opportunity to make a full presentation of her/his views. Questions may be asked by the decision-makers. But, the fact remains that no teacher will succeed in a bid for change of affiliation unless that person can persuade the decision-makers that the integrity of the mandatory jurisdictional Affiliate lines will be fully preserved.

Such, in my view, is the general thrust of Ms. Wilson's testimony:

Q. You have seen the by-laws and also the policies of OTF that allow membership change *for a reason*. Would you agree with me that *for a reason* is interpreted by OTF to mean that there must have been an error in classification under the by-law?

...

A. An error would be one reason.

Q. Well, are there instances where a teacher was properly classified under the by-law and was allowed to change membership for a different reason, ignoring the application of the by-law?

A. Well, there are instances where a member should be reclassified because of the location at which the member is now teaching, specifically related to mentally retarded children in the school system,

where the effect on the member's salary would be such that at least for a time definite the reclassification has not occurred. (Tr. Vol. 17, at pp. 2012-2013.)

(The *exception* to change of membership because of an error in classification cited by Ms. Wilson related to a small number of teachers who would lose income by having their Affiliate assignment changed.)

Ms. Wilson's testimony continued:

Q. Under the by-law which allows change *for a reason*, the appeal is to the Executive?

A. The appeal is to the Executive and the [Board of] Governors could advise the Executive. The Governors own the actual by-law.

Q. But, the Executive own the authority to allow an appeal *for a reason* and not apply the by-law?

A. The Executive own that part of the process, yes.

Q. In the case that we are dealing with, the appeals of Linda Logan-Smith and Margaret Tomen were refused?

A. Yes.

Q. And everything they put forward as a reason was not accepted as a



reason for a change?

A. I assume so.

Q. You are aware that one of the things that was put forward as a reason was their rights under the *Human Rights Code*?

A. Yes.

Q. *And all the other women that we have seen who have applied for a change were also simply told that you are properly classified under the by-law and that is where you must stay?*

A. Yes. (Tr. Vol. 17, at pp. 2029-2030.)

Ms. Wilson's predecessor at OTF, W.A. Jones, also made it clear that appeal procedures to change statutory membership on the basis of gender existed, but the outcome was determined. Fairness in the sense of an open consideration of the appeal had no application in such cases:

Q. . . . Would there have been discussions about fairness there [the appeal procedure to change statutory membership assigned on the basis of gender]?

A. No, because the regulation and the by-law, it was quite clear in how to handle gender. But, nevertheless it [the appeal] would still [be]

refer[red] to those particular Affiliates for consideration before reporting back.

Q. When you say it was quite clear, do you mean that the result was unavoidable?

A. You could argue that. (Tr. Vol. 10, at pp. 1237-1238.)

As stated, the democratic processes of OTF, including the appeal procedures from assignment of statutory membership on the basis of gender, have meaning as applied to Affiliates as organizations. They have little meaning as applied to the affected individual teachers. *By consensus, the Affiliates set the jurisdictional rules. Individual teachers could only ask that those rules be applied fairly. There was no recourse for an individual public elementary school teacher who objected to assignment of Affiliate on the basis of gender, because that was how the Affiliates had written the rules.*

## **H. By-Law 1: A "Flexible" Regulation**

Throughout these hearings, those opposing the Complaints have argued that OTF By-Law 1, in effect, is a finely honed instrument to achieve and entrench protection of the interests of disadvantaged groups. FWTAO membership of women elementary public school teachers is such a group, and through mandatory membership in the Affiliate, so the argument proceeds, their interests are protected.

In my view, the history of By-Law 1 neither expressly nor impliedly reflects an

intent to protect disadvantaged groups, such as women public elementary school teachers. Rather, it is a regulation with a history of some flexibility. In this regard, where there has been change I believe the facts will show, sometimes on the face of the By-Law itself, that the reason for change was rooted in protection of institutional jurisdictional lines.

As indicated, mandatory membership came with the statutory establishment of the OTF in 1944. But, mandatory membership in terms of *assignment to particular Affiliates* was not put into place until several years later. From 1944 to 1949, Affiliate membership was *voluntary*. And, from 1949 until 1959, while Affiliate membership was required, individual choice was not dictated. Teachers had to be members of OTF, but they could select the Affiliate with which they wanted to be associated. The 1949 By-Law 1 provided:

A member of the OTF shall be a member of an affiliate body except in cases where the member has been suspended and/or cancelled from membership in an affiliated body and/or cancelled from membership in an affiliated body for unethical and/or unprofessional conduct.

Voluntary members of the OTF shall be members of an affiliated body or association.

Application for voluntary membership under Regulation 15 shall be submitted through an affiliated body to the Board of Governors.

*A teacher who teaches part time in an elementary school and part*

*time in a secondary school shall notify his Board of his choice of affiliated body.*

I have italicized the final provision of By-Law 1 to demonstrate that, at times, there was indeed a real choice to be made. It was not always *custom* which controlled affiliate assignment. The By-Law offers but one express illustration: the teacher who teaches part time in an elementary school and part time in a secondary school. (See, Exhibit No. 45, *Progression of By-Law 1 from OTF's "We the Teachers,"* Tab 1, p. 61.)

W. A. Jones, OTF Secretary-Treasurer from 1974-1985, had an understanding of the history of By-Law 1 both from his employment with OTF and OSSTF before becoming Secretary-Treasurer and as a teacher. He stated:

A. From my knowledge, I suspect that we are dealing with industrial arts teachers, music teachers, art teachers. In some of the communities the high schools would be quite small. There are all kinds of community single high schools. And so a music teacher might teach part time at a secondary school and part time in the elementary school. Or, a home economics teacher might do the same thing. And sometimes they travelled to schools and then sometimes the students came to them. For example, at Chatham Collegiate elementary students would come to the collegiate for industrial arts training and home economics training.

Q. So as early as 1949 then the Federation [OTF] had to deal with the membership of teachers who might teach cross boundaries, so to speak,



in elementary and secondary schools? (Tr. Vol. 9, at p. 1066.)

What has been demonstrated are *individual teachers free to make a choice* who by custom would not as such be assigned or have a propensity as an abstract proposition to opt for either the elementary or secondary affiliate. If By-Law 1 were designed to entrench protections for disadvantaged groups, why wouldn't there be assignment based on some criteria relating to the needs of the disadvantaged group?

In 1959, the following OTF policy resolution was approved:

It is the policy of the Ontario Teachers' Federation (1) That any request to change from one affiliated body to another by a statutory member of the Federation be referred to the Executive of the Ontario Teachers' Federation, who, in conjunction with the executives of the affiliates concerned, will have the power to change the affiliation of the member, *for a reason.*" [Italics added.] (Exhibit no. 45, at Tab 4, p. 40.)

Nowhere was the meaning of the term "for a reason" set out. Nor was the nature of decision-making between the "affiliates concerned" described. In effect, however, as early as 1959, the limitations of *for a reason* and the need for full concerned Affiliate agreement, as described by Ms. Wilson in the previous subsection, were in effect. Mr. Jones testified:

Q. Mr. Jones, did I correctly understand you to say that you did recall there were applications from either male or female elementary school teachers to change affiliates?

A. Yes.

Q. And you recall that they were not permitted?

A. Yes.

Q. And I asked you if reasons were given, and I'm trying to ensure that I understand your answer now with respect to reasons. When it involved that particular kind of boundary change, was it an automatic denial because of the way the by-law was established, or were other reasons examined?

A. Well, there is one step missing, and that is, in spite of what one would think would be the anticipated solution, it was always referred to the particular affiliates for discussion and report back.

Q. Yes. And they had to report back either in the affirmative or the negative?

A. Yes.

Q. And supposing that . . . one affiliate reported back in the positive and the other in the negative, then what ensued?

A. Then invariably there would be a negative decision.

Q. By the OTF?

A. By the OTF Executive.

Q. So there had to be a unanimous acceptance of change before the OTF would permit it?

A. Yes. (Tr. Vol. 10, at pp. 1235-1236.)

By 1964, however, jurisdictional questions under By-Law 1 became more acute with the developing growth of junior high schools which encompassed grades seven, eight and nine. The reason was that grades seven and eight were included within the elementary panel, and for teachers of those grades that meant assignment either to OPSTF or FWTAO. However, teachers of grade nine were deemed included in the secondary panel and that meant assignment to OSSTF, a mixed-gender association. Yet, the reality was that for all practical purposes, the teachers, male and female, at a particular junior high school would be together and teaching at that particular site. In North York, at that time a fast growing community, there were twelve junior high schools employing about 600 teachers. And, more junior high schools were scheduled for construction. (Tr. Vol. 9, at pp. 1088-1089.)

The issues that arose out of the teacher mix, based on the record, and especially the testimony of Mr. Jones who was called by OTF on this point, were those of *money and jobs*. There was some movement between the elementary and secondary affiliates based upon money and jobs. There was nothing said by FWTAO in this

record about such movement as it might impact on that Affiliate's equality-seeking program. Mr. Jones spoke about money as a motivating factor for a teacher to change affiliates:

A. And you also had differentials in salary scales developing. And the secondary salary scale might be - it generally worked this way, that the secondary school salary scale might be a few hundred dollars higher than the elementary salary scale for the same qualifications. So teachers being human, some of them would get a bit upset about that because they were working under the same roof and have perhaps the same qualifications but receiving two or three hundred dollars a year less. And two or three hundred dollars a year less at that time was a lot of money.

And so some of them would find that the lure of the dollar was a lot more attractive than the lure of the affiliate. And so, quite naturally, some would move to the affiliate that had the slightly better salary schedule. So that kind of problem existed. Now, I don't think it was a major problem. (Tr. Vol. 9, at p. 1091; see, Tr. Vol. 9, at pp. 1089-1090.)

And, Mr. Jones also spoke about jobs in a period of redundancy. Instead of moving to an Affiliate, such as OSSTF, which might have had a higher pay scale, in a particular school then subject to layoff, teachers might be prone to move to either OPSTF or FWTAO if by doing so they might have better job security:

... [Junior high schools] had grades 7, 8 and 9, seven and eight being



elementary, part of the elementary panel, and nine part of the secondary panel. So, if it had been a perfect world, two-thirds of the teachers in a junior high school would have been members of FWTAO or OPSTF. However, the world was not perfect. And, the by-laws . . . allowed persons teaching in either panel to choose.

And, over a period of time . . . more persons had chosen to be members of of OSSTF. So instead of having the perfect one to two relationship . . . you had different kinds of ratios depending on the school.

Now, the collective agreements had started to include . . . procedures to identify those persons who would be declared redundant because we [were] in a period of declining enrollment. And in the junior high schools you had this disproportion of membership and you also had a rapidly declining enrollment. And, it created a problem for the affiliates in terms of identification, because some of the teachers in those schools were moving from one affiliate to another if possible because of the redundancy provisions. If they saw that the redundancy provisions in one contract, one agreement would give them better protection than another, human nature being what it is, they would try to take advantage of that. . . . (Tr. Vol. 10, at pp. 1133-1134.)

The problems emanating from crossed jurisdictional lines within junior high schools did not suddenly arise. These difficulties existed for about ten years. During that time, OTF, as such, did not act to resolve the problems. Rather, following its

custom, OTF referred the issues to the affected Affiliates for solution (FWTAO, OPSTF and OSSTF). OTF, as an organization, was available to these Affiliates should help have been requested. This deference to Affiliate control was described by Mr.

Jones:

. . . Because of the nature of the organization [OTF], the checks and balances built into it, in order to survive, if you want, it [OTF] really had to allow those Affiliates involved in problems to sort them out. Now, that doesn't mean that others within the [OTF] Board [of Governors] weren't willing to help them. But, as I say, it [the problem] would get referred back and it would come forward, and then would go back and then finally we had this resolution. (Tr. Vol. 9, at p. 1093.)

The affected Affiliates struck their own agreement which was communicated and made a part of the OTF By-Laws as an amendment to section 4 of By-Law 1:

A teacher in a school designated as a junior high school, who holds elementary school certification only, shall be a member of the appropriate public school affiliate; a teacher who holds secondary school certification only shall be a member of OSSTF; and a teacher who holds certification for both public and secondary schools shall be permitted to select, at the time of hiring or of obtaining dual qualification, the affiliate to which he wishes to belong, and such teacher, having so elected, will not be permitted to change his affiliation while teaching in a so-called junior high school; and a teacher who holds neither elementary nor secondary qualifications

shall have his affiliate membership designated by the school principal.  
(Exhibit No. 45, Tab. 5, at p. 32.)

The single control over the assignment of teachers to Affiliates was *certification*. This was not based on gender nor, in that regard, any kind of group equality-seeking program. Indeed, *individual choice was permitted for a woman public elementary school teacher, if she obtained dual certification*. And, on the other side of what may be called the power equation, note what was done to the teacher without qualifications, a person probably in the weakest position. The school principal, the very person FWTAO argues is usually male and dominating, was given the power to designate affiliation.

The amendment to By-Law 1, set out above, was in effect until 1979, a period of more than ten years. At that point, it was again substantially amended. It was, according to Mr. Jones, designed to reflect more declines in student enrollment. (Tr. Vol. 10, at pp. 1117-1118.) The amended by-law is substantially the same as that of today except for certain grandparent provisions:

4. For teachers in public schools having both elementary and secondary school students, the following rules will apply to ensure that each Affiliate has the number of members to which it is entitled.

(a) As of the effective date of the By-Law 1 revision, teachers in schools with both elementary and secondary students be allowed to retain their present membership as long as they remain in that school or type of school within the board. A teacher who does not choose to retain

present membership shall be assigned Affiliate membership under (c) below.

(b) A teacher transferring from a school with both elementary and secondary students to a regular elementary or secondary school will become a member of the appropriate Affiliate.

*(c) A teacher assigned to a school with both elementary and secondary students shall have Affiliate membership determined by the number of students in each panel within that school, except that such assignment must ensure that balance is maintained within the system, such a balance to take into account the student-teacher ratio in each panel. This membership shall be maintained as long as the teacher remains in this type of school within the board. [Italics added.]*

(d) The Affiliate membership of a teacher who is new to a board and who is assigned to teach in a school with both elementary and secondary students will be designated to correct an imbalance of members by Affiliate in the system.

(e) A teacher who prior to August 31, 1988 is subject to an involuntary transfer from a secondary school in North York or East York to a junior high school, shall be able to maintain secondary affiliation, or may apply to the OTF Executive for transfer to an elementary Affiliate in that school. (Exhibit No. 45, Tab 8, at pp. 15-16.)



Faced with a deepening decline in student enrollment, the affected Affiliates agreed to remove the *individual choice afforded appropriately certified junior high school teachers*. On the face of the then newly amended By-Law I, section 4, the reason for a different approach is given: Under subsection (c) membership is to be determined with a view toward effecting a "balance" between the elementary and secondary panels, bearing in mind the existing student-teacher ratio at any particular school. In effect, the elementary school Affiliates and OSSTF reached an agreement as to jurisdictional boundaries. The essence of that agreement was founded in a formula of ratio and balance, not, as such between FWTAO and OPSTF, but rather between the elementary school and secondary school panels.

The thrust of such an agreement is, as I stated, one to resolve jurisdictional boundaries; it is not one to further an equality-seeking goal on the part of FWTAO. Moreover, I note that under subsection (d) of the amended by-law, *new teachers, and this would include female teachers, are to be assigned to correct any imbalance. This means under the terms of the by-law, itself, if the imbalance correction needed were one to favour OSSTF, then a new female teacher would be assigned to that Affiliate rather than FWTAO*. Again, such a decision hardly comports with viewing By-Law 1 as an affirmative action program by FWTAO for female elementary school teachers.

Considerable detail has been given to the evolution of By-Law 1 as it relates to junior high schools. It offered a concrete and important illustration as to the willingness and capacity of FWTAO, OPSTF and, in this instance, OSSTF to meet the organizational imperatives of a then new and rapidly growing educational institution (junior high schools) that, in turn, became the object of dramatic change

a decade later (falling student enrollments).

Now, it may be that FWTAO simply had to effect such compromises as an organization if it were to live and function effectively with other organizations. That is, By-Law 1 was (and is) intimately bound to the organizations which created it and, from time to time, have amended its provisions. But, isn't that a part of the difficulty for an organization such as FWTAO, on the facts as given, for there to be qualification as a section 14 program under the *Human Rights Code*?

Bear in mind, that FWTAO is *not challenged as an organization by and for women public elementary school teachers*. The challenge under the *Human Rights Code* goes to the power on the part of OTF to *compel statutory membership on the basis of gender*. In this regard, there is no challenge to the power of OTF to *compel statutory membership in an Affiliate*. Again, the question under the *Human Rights Code* is whether there can be *compulsion to be a statutory member solely on the basis of gender*. These points have been made before. They are repeated here to place the compromises incident to organizational life in a more specific context.

In the final analysis, By-Law 1 has indeed changed over the years, as those opposing the Complaints have argued. In my view, however, those changes bear no meaningful connection to any equality-seeking program on the part of FWTAO. Rather, they relate to give and take between Affiliates in working out jurisdictional lines in a changing educational world.

## I. Choice: Meaning and Effect

Throughout these proceedings there has been an operating assumption that *to allow female public elementary school teachers a choice of Affiliate would be an ongoing exercise*. That is, by way of example, should choice be allowed, a female public elementary school teacher might decide on one day to become a statutory member of OPSTF, and then on the next day, she might switch to FWTAO. Such a possibility would put FWTAO continually at risk. Its resources would have to be directed continuously toward keeping existing members. FWTAO would become the only Affiliate, so I was told repeatedly, with a voluntary member base. Not only would this have an affect on the allocation of resources, but it would impact on the organization's credibility in relationship to other Affiliates.

In commenting upon the relevance of *Blainey v. Ontario Hockey Assn., et al.*, 9 C.H.R.R. D/4549 (Springate), Counsel for FWTAO stated in Final Argument:

More importantly, the *rule* under attack in this case is an integral part of a system of teacher representation and collective bargaining in this province, within a context within which (i) membership for all other organizations in the system is mandatory, and (ii) mandatory membership serves important policy goals. To deny FWTAO mandatory membership would be to deny it equality of status with the other organizations functioning in this structure. A voluntary sports league cannot be analogized to this situation. (3 *Argument on Behalf of FWTAO*, at p. 281.)

The testimony of Kay Sigurjonsson, Associate Executive Director of FWTAO, a position whose functions she performed for between ten to twelve years, offered a rather complete statement concerning the Affiliate's perception of choice and its likely effect should such be the final ruling. (As Associate Executive Director, Ms. Sigurjonsson's responsibilities include staff supervision in relation to FWTAO's protective and political work, collective bargaining, affirmative action and public relations. Tr. Vol. 43, at p. 6037.)

Because of its importance, I will set out in some detail relevant statements of Ms. Sigurjonsson both as to her perception of the meaning of choice and its likely effect on FWTAO, should that be the final ruling in this matter. Under direct examination by Counsel for FWTAO, Ms. Sigurjonsson stated:

Q. In your view and based on your experience, what would be the result if elementary women teachers were allowed to choose between FWTAO and OPSTF?

A. If you're asking me would there be a stampede out of the Federation of Women Teachers and into OPSTF, I don't think there is any evidence of large-scale dissatisfaction with the Federation of Women Teachers. It has been, as you have had evidence, for some time a campaign of OPSTF to seek voluntary membership for women for a number of years. . . . [T]hat campaign has been, in some parts of the Province fairly vigorous, but the numbers involved have been not very large, given the large membership of our organization [about 40,000]. So I don't think that the impact would be that women would



choose to join OPSTF. But I think - I suppose the difficulty that most people have with this case is getting their minds around the idea that any organization which is mandatory. But once we get our minds around that fact, the mandatory nature of the Ontario Teachers' Federation but in effect the other Affiliates that have a protected and stable and, as it were, mandatory membership, to have only one of those Affiliates not have a protected and stable membership base would be extraordinary.

It seems to me that it would challenge the basis of the whole structure . . . . And I'm sure you have had testimony about why it's mandatory: because we are a professional organization as well as a union, and it is in the government interest to have the organization be mandatory.

If four of those organizations of the five were to be mandatory, and one to be virtually voluntary . . . I do not see how the regime could survive within a mandatory structure, because there would be a loss of credibility in a group which becomes essentially, if I may use the kind of expression I don't like to use because it sounds sexist, but I think you will all know what I mean by the expression - It would become essentially the *ladies' aid* of the teaching profession, not a compulsory or mandatory organization with the credibility and the clout that implies but, instead, a voluntary organization. So that is one of the outcomes.

I think, from a public perception point of view, one of the problems

goes much more to the question of which of those organizations loses its mandatory membership. I think to the human rights community and to the women's community it would be an astounding development if the one organization of the five which loses its mandate were to be this equality-seeking organization, and that it lost its credibility and its status and its power through a piece of legislation, the Ontario *Human Rights Code*, which has been designed to protect the disadvantaged; in fact, whose mandate is almost indistinguishable in some ways from ours, and that, furthermore, that loss of status comes through the use of the Ontario *Human Rights Code* by an organization which, for at least ten years, has opposed root and branch the equality-seeking of the Federation of Women Teachers and the public policy represented in the affirmative action policies of the provincial government. So I think that would be the second stunning fallout.

...

Q. Do you think choice would have any practical impact on the status of women elementary teachers in Ontario?

A. I think I have already alluded to that in the sense that the organization would be seen as being taken much less seriously than the other four groups. Those other four groups are entitled to mandatory membership; the Federation of Women Teachers can struggle every day of its life in order to hang onto its membership base. *I do not*

*believe, and I repeat this, that there would be large numbers of women wanting to leave the organization, but the important equality-seeking work of the Federation [FWTAO] would be reduced in impact in direct proportion to the amount of time, energy, money, resources and people that had to be put into, in effect, organizing the membership of the Federation of Women Teachers because of the ever-present possibility that alone among the teachers of Ontario the women teachers would have a choice of with whom to affiliate, while the other Affiliates, all four of them, continue to bask in the stability, in the resources, in the respect that come with automatic membership, with continued automatic membership. [Italics added.] (Tr. Vol. 45, at pp. 6365-6370.)*

The matters of choice and effect of choice were pursued in cross-examination of Ms. Sigurjonsson by Counsel for OSSTF:

Q. Well, in a case of non-mandatory membership [in OPSTF], if these inducements [by OPSTF to enlist female members] turned out in fact not to be truthful, then presumably the individual needn't stay with OPSTF, or whatever Affiliate. They could return to FWTAO. Is that correct?

A. Yes, and, of course, that is what has happened with a number of voluntary members who have found if not their names at least the number they represent being used to prove that there is a great deal of dissatisfaction with the Federation of Women Teachers, and many of

these women have said in outrage to us . . . *I didn't know that's how my number was going to be used.* But, you are describing to the extent that you have described the possibility of somebody moving out of the Federation [FWTAO] and moving back in again as a real recipe for chaos.

...

A. . . . The entire loss would be borne - whatever the loss turned out to be - by the Federation of Women Teachers.

THE CHAIRMAN: Have you attempted in any way to quantify that loss - that potential loss?

THE WITNESS: No. I think I did say yesterday that my own guess is that it would not be a significant number because of the very small number of women who have over many years of the OPSTF attempted to organize voluntary members or to encourage voluntary membership - the very small number of women who have availed themselves of that membership.

I don't think the loss would be large. I think it's much more a matter of of principle - of just one organization having the potential for loss. . . .  
(Tr. Vol. 46, at pp. 6478-6480.)

As I read the evidence, especially of Ms. Sigurjonsson, a person with lengthy



experience as an important staff officer of FWTAO, charged with, among other things, collective bargaining responsibilities, I believe she has (1) assumed that to grant women choice as to Affiliate (FWTAO or OPSTF) means a continuing right to select the organization to which statutory membership should attach. In effect, a woman public elementary school teacher can move back and forth between Affiliates with frequency. (2) Even in that situation, the actual loss of members to FWTAO is not likely to be significant. (3) What FWTAO will suffer from this condition, however, is a loss of credibility, and the need to allocate resources to membership which would otherwise be used to further equality-seeking ends.

In view of the order in this decision, it is necessary to emphasize the following:

1. What the Commission has sought, among other things, in terms of relief in this matter is "(a) a declaration that the OTF By-Law [1] requiring OPSTF members to be male violates the *Human Rights Code*; (b) an order that OTF amend the by-law in a manner that will permit women to join OPSTF. . . ." (Commission Final Argument, at p. 23.)

2. There has been no evidence led as to the meaning of *choice*. There is absolutely no basis in the record for concluding that choice on the part of women to select between elementary panel Affiliates *means a continuing choice*.

3. Nothing the Commission or those supporting the Complaints have said in these proceedings suggests a *Human Rights Code* challenge to the obligation of teacher statutory membership, including membership in an Affiliate. In

this regard, as a general matter, I have not observed any challenge, as such, to principles contained in what may be described as the general labour policy of Ontario.

4. The points set out above are intended to be included for consideration by the OTF and its Affiliate members in implementing the decision of this Board of Inquiry.

#### **J. The Application of *Blainey v. Ontario Hockey Association et al.* (1987) 9 C.H.R.R. D/4549 (Springate)**

In my view, the Board of Inquiry decision in *Blainey v. Ontario Hockey Association et al.* (1987) 9 C.H.R.R. D/4549 (Springate), though not binding on me, nonetheless is instructive. It deals with a fact situation that has some important aspects of similarity to the case before me. And, it focuses on how the special program provisions in what is now section 14 of the *Human Rights Code* apply to those facts.

The decision of the Board of Inquiry followed the ruling by the Ontario Court of Appeal [(1986), 54 O.R.(2d) 513, 7 C.H.R.R. D/3529 rev'g. 6 C.H.R.R. D/3076] which nullified then section 19(2) of the Ontario *Human Rights Code* because it was contrary to section 15(1) of the *Charter of Rights and Freedoms*. Section 19(2) of the *Human Rights Code* barred complaints of discrimination by athletic organizations on the grounds of sex. The *Charter* grant of equality within the meaning of section 15(1) overrode the *Human Rights Code* bar.

In the result, the Human Rights Commission accepted the complaint of Justine

Blainey, a thirteen-year-old who, although qualified, was denied a position with an all-boys' hockey team, the Etobicoke Canucks, part of the Pee wee "A" Hockey League that is affiliated with the Metropolitan Toronto Hockey League (MTHL). On the basis of her skill and ability, following a tryout, Ms. Blainey was offered a position with the Canucks. However, the President of the Canucks later notified Ms. Blainey that her sex rendered her ineligible for the team.

It was the policy and program, claimed to be justified under section 14 (then section 13 of the *Human Rights Code*), that prevented Ms. Blainey from playing with the Canucks which was examined and found wanting by the Board of Inquiry. The MTHL was a member of the Ontario Hockey Association which had adopted a policy of *restricted integration*: Females were prohibited from playing on male teams except where there was no comparable all-female team in the relevant geographic area. There were *comparable all-female hockey teams in the geographic area where Ms. Blainey lived*. Therefore, the decision was that Ms. Blainey should play on an all-female team. *This decision was intended to be supportive of an all-female hockey program established in 1975 by the Ontario Women's Hockey Association (OWHA).*

The facts made it clear that females were a disadvantaged group in terms of having meaningful opportunities to participate in sports. More specifically, the OWHA was able to establish a full hockey program for females only. It was a program that, in effect, had a feeder system. As girls grew older they moved to more advanced teams. What the OWHA feared, if Ms. Blainey were permitted to play for the Canucks, was the potential destruction of girls-only hockey: (a) Females would leave the OWHA to play on boys' teams, and (b) boys, not otherwise qualified, would seek to play on

what would have been all-girl hockey teams.

Now, I come to the findings made by the Board of Inquiry. They are not dissimilar to those which I have made, based on the record in this matter:

- It was not the OWHHA, as an organization, which sought status as a special program. Rather, it was *the hockey program of the OWHHA* which was held out as a special program under the *Human Rights Code* and, as such, the program was found acceptable by the Board of Inquiry. It was stated:

I am satisfied that the hockey program offered by the OWHHA does, in fact, qualify as a special program under section 13(1) of the [Human Rights] Code. The evidence clearly establishes that as a group females in this province do not have the same opportunity as males to play organized competitive hockey. Female hockey must continually struggle against the view that hockey is a male-only sport. It must struggle for access to ice time.

Because of these handicaps, the program offered by the OWHHA does not have the same level of participation as does male hockey. Further, while post-puberty females can compete against similar age males in terms of skill and intelligence, the majority cannot compete in terms of size and strength. Although pre-pubescent girls can compete equally with pre-pubescent males, to allow young boys to play on girls' teams would lead to serious difficulties for female hockey. Many parents are opposed to their daughters playing hockey, even on all-female teams.



This opposition would likely intensify if males were permitted to play on female teams.

Most females desire to play on all-female teams. To allow males to play female hockey would likely result in a large number of females leaving the sport. It follows that if males were permitted to play OWH A hockey, even a small number of them would likely have a major adverse effect on the already limited opportunities for females to play competitive hockey. *My finding that the OWH A's program of female hockey meets the requirements for a special program under section 13(1) of the Code means that OWH A teams can continue to refuse to admit males without infringing section 1 of the Code.* (9 C.H.R.R. at ¶35401.) [ Italics added.]

In the matter before me, the Commission and the parties supporting the complaints specifically agreed that no challenge was made to the right of FWTAO to continue as a women-only professional association. This means that FWTAO can continue to restrict its membership to women. I do note that this stipulation was made without reference to section 14 of the *Human Rights Code*.

- Ms. Blainey, on the facts, was offered a *comparable hockey experience, albeit with an all-female hockey team*. In this regard, it was accepted that Ms. Blainey, while an above-average player, was not exceptional. She would have found real challenge, real competition in all-female hockey. The argument was made that she did not suffer from the compulsion to play only all-female

hockey.

The Board of Inquiry rejected this argument:

The respondents and the OWHHA contend that the restrictive integration policy of the Ontario Hockey Association, and its application to Ms. Blainey, do not violate section 1 of the *Human Rights Code* in that the policy is a reasonable one having regard to its purpose and effect. They contend that Ms. Blainey was not adversely affected by the policy in that she had the opportunity to obtain a hockey experience equal to that denied her on the Etobicoke Canucks by playing on an OWHHA team.

There can be no doubt that the OWHHA does offer females a meaningful hockey experience. *The fact remains, however, that Ms. Blainey did not desire to play on an OWHHA team. She wanted to play hockey where body checking is allowed. In particular, she wanted to play on the Etobicoke Canucks. She had the strength and skill to be selected to play on the team. Had Ms. Blainey been a boy of the same age, she would have played hockey for the Etobicoke Canucks. She was refused permission to do so only because of her sex. I am satisfied that this amounted to unequal treatment and discrimination on the basis of sex.* (9 C.H.R.R., at ¶35398.) [Italics added.]

That which the Board of Inquiry recognized as discrimination under the Code was the denial to Ms. Blainey of the right to play on a boys' hockey team -

even in the face of a comparable experience available to her on an all-female hockey team. Ms. Blainey for herself wanted the experience of boys' hockey and body checking. Impliedly, the Board of Inquiry accepted the judgment of Ms. Blainey. But for the restricted competition bar, she would have been able to play for the Etobicoke Canucks.

Similarly, whatever might be the so-called real and, perhaps if the views of the FWTAO experts were accepted, better experiences that might flow from statutory membership of all women public elementary school teachers in that organization, their right to a claimed mixed-gender professional experience on the basis of equality is one that must be recognized.

- It did not follow, however, that permitting female-only hockey required the *compulsory membership of girl hockey players in the OWHHA*. The Board of Inquiry stated:

The fact that the program offered by the OWHHA qualifies as a special program under the Code does not, however, reasonably lead to the conclusion contended by the respondents and the OWHHA that all females must play on OWHHA teams. It was not argued, and the evidence does not indicate, that male hockey needs to be protected from females. *Further, the evidence does not support the contention that if females are allowed to play on male teams, female hockey in this province would be at risk. The weight of the evidence establishes that females prefer to play on all-female teams, a preference presumably reinforced by parental and cultural pressures against girls*

*playing hockey with boys.*

As already noted, during the hearing the only female identified as desiring to play on a male team, notwithstanding the availability of a comparable OWHHA team, was Ms. Blainey herself. From ages 15 and up, most females are simply unable to successfully compete against males because of differences in height, weight and strength.

Given these considerations, I am satisfied that while there may be some adverse impact on the OWHHA if females are allowed to play on male teams, the impact will prove to be relatively modest. Such an impact is not sufficient to deny to Ms. Blainey, an individual who desires to play on a male team and has the ability to do so, her right under section 1 of the Code to equal treatment without discrimination because of her sex. (9 C.H.R.R., at ¶35402.) [Italics added.]

The weight of the evidence in the matter before me suggests that (1) there will not be a significant loss of FWTAO members if women public elementary teachers are permitted to choose Affiliates. I base this finding largely on the testimony of Ms. Sigurjonsson which was set out in some detail in the previous subsection. (2) The definition of *choice*, as I indicated, need not be such as to unduly disrupt institutional programming. (3) In any event, the Board of Inquiry in *Justine Blainey* commented on loss of membership in terms of how it might affect a program. FWTAO's comments concerning potential loss of membership are directed not to programs, as such, but rather to it as an organization.



## Summary

There are a number of conclusions which I have drawn from what has been described:

- In no small measure, many of the goals of the Affiliates have been actualized through the political process of provincial legislation. I refer especially to the subjects of "automatic membership," the creation of the OTF, and the place of OTF and the Affiliates in collective bargaining.
- "Automatic membership," the prelude to OTF By-Law 1, and the By-Law, itself, have been fluid concepts. They have changed over the years. The evolution of teaching and the development of education, reflected in part by student demographics, have in turn affected mandatory membership. Not always were female teachers in the public elementary schools either required to be members of FWTAO or bound to join FWTAO in terms of organizational representation. The extended discussion relating to junior high schools is illustrative of this. The decisions made in amending By-Law 1 were related to drawing Affiliate jurisdictional lines, not the implementation of an equality-seeking program.
- FWTAO, OPS(M)TF, and OSSTF had a substantial history dating from decades before the establishment of the OTF. In that time, these organizations were voluntary. And, as voluntary organizations they had successfully recruited large portions of their then perceived teaching constituencies.

- The FWTAO constituency at times has reflected disparate interest groups with the result that the will of the majority could and did become oppressive to minorities. Examples of this include the relationship of married teachers to single teachers and occasional teachers to full-time teachers.
- OTF came into existence as a matter of provincial legislation. It was assigned by law with certain tasks, not the least of which was liaison between the teaching profession and the Ministry of Education. Its constituency, that is, its membership was *organizational*. It consisted of the then Affiliates who were assigned a given number of governing positions in OTF. This translated into governance by OTF through *consensus*. That is, if policy questions arose between two or more Affiliates, OTF took the view that such conflicts should be resolved by the affected Affiliates, and not in a more general way by OTF.
- Law mandated compulsory teacher membership in OTF. It said nothing, as such, about compulsory membership in any of the Affiliates. Such assignment, if there were to be any, was left to the OTF. Both in law and from a practical point of view, this meant that OTF, controlled as it was by the Affiliates, could alter its membership patterns as it saw fit. And, the facts demonstrate that this was indeed done over the years.
- There is nothing in the record defining the meaning of *choice*. It does not follow that the exercise of choice in selecting an Affiliate by women public elementary school teachers means the *right to continuously chose*.

Such justification as there might be for compulsory membership in FWTAO on the

basis of gender would be based on a finding that that organization, as such, is a special program within the meaning of section 14 of the *Human Rights Code*.

For the reasons stated, the finding must be that FWTAO is not a special program within the meaning of section 14 of the *Human Rights Code*.

### III

#### A. An Overview of the Labour Relations Issues

##### 1. The Primacy of the *Human Rights Code*

In this portion of the decision, I focus upon what was referred to earlier as *labour relations*. In effect, as I understand the position of those opposing the complaints, this case really is one involving two unions (professional associations): FWTAO and OPSTF. The latter is attempting to raid the former for the purpose of acquiring the dues base of that union. I am told that I should recognize this as central to the case. At several points throughout these proceedings, those opposing the complaints noted that OPSTF has paid the full costs of Counsel for the individual complainants. This, it was argued, was illustrative of the so-called true nature of the conflict.

Those opposing the Complaints would divide this case into what they call its *human rights perspective* and its *labour relations perspective*. This approach appears to follow the reasoning of Prof. Paul Weiler, referred to in Part I of this decision, and called as an expert in labour law and labour relations policy in Canada and the United States. Professor Weiler, a member of the faculty at the School of Law, Harvard University, stated:

It seems to me that what has produced this human problem and human concern . . . is the intersection of two very distinct but ultimately having to be resolved public policy programs - the human rights policy and the labour relations policy.



The human rights policy - promotion of equality, elimination of discrimination - to the extent there is a concern there - fairly, in principle, there is a legitimate concern by arrangements that have evolved - it is a concern about the existence of two separate - two segregated organizations.

The answer to that concern, if there is an answer, is that the existence of a separate but equal organization for women teachers is justified as a form of affirmative action and therefore it really isn't the kind of discrimination that the policy of human rights law is intended to eliminate.

Superimposed on that, as I have said, is this further question about the mandatory or voluntary character of membership in this assertedly separate but equal women's organization.

That, it seems to me, is not a human rights law [issue]. That is a labour law problem, and the thrust of my testimony and, to the extent that I have it, of my expertise, is to suggest that the degree of compulsion that is operative here is perfectly justified *as a matter of labour law policy in Canada* - one that has been accepted now constitutionally - that that intrusion on individual freedom of choice about whether to belong to a union and, if so, which union to belong to, is a mutual policy.

It operates for the benefit of and to the detriment of all of the teacher organizations and teachers or others. And, the fact that it happens to

get tied in here to this further question of whether separate but equal is *ipso facto* improper discrimination or is perfectly legitimate affirmative action, that is an accidental connection and the human rights legislative focus on this should be on whether separate but equal unions, voluntary or mandatory, are themselves a violation of the *Human Rights [Code]*. (Tr. Vol. 71, at pp. 9515-9516.)

Both FWTAO and OECTA stated that the so-called human rights perspective related to whether FWTAO has the right to function as a single-sex organization within the meaning of the *Human Rights Code*. By agreement, the Commission and those supporting the complaints have accepted the right of FWTAO to operate as a single-sex organization.

Recognizing the labour relations context of the case results in the following conclusions: (1) Compelled membership in FWTAO cannot be seen as discrimination within the meaning of the *Human Rights Code*. (2) Labour relations policy is conducive to a finding that FWTAO is a special program within the meaning of section 14 of the *Human Rights Code*.

In his final argument, Counsel for OECTA wrote:

As Prof. Weiler testified, these complaints have both a human rights and a labour relations dimension. The human rights perspective is the alleged sexual discrimination in being compelled to pay dues to be a (statutory) member in a single-sex organization. The labour relations perspective is the compelled payment of dues or compulsory (statutory)

membership in that organization. The [Human Rights] Commission and Complainants accept that a single-sex organization, such as FWTAO, does not contravene the [Human Rights] Code as they submit that it should continue to exist even if a violation of the Code is found by the Board. Their complaint is the *compelled* payment of dues to or the *compelled* membership in FWTAO.

Their complaint goes to the labour relations aspect referred to above. Compelled payment of dues to an employee association has already survived *Charter of Rights* scrutiny by the Supreme Court of Canada. The fact that the compelled payment of dues or compulsory membership is on the basis of sex is legally irrelevant in these circumstances. If a single-sex organization does not *discriminate* on the basis of sex within the meaning of the Code, then the assignment of women to this organization for representation purposes does not make the organization discriminatory. The issue is really the propriety of exclusive representation and the propriety of the single-sex organization. As a result, even if there is injury to dignitary interests on the facts at bar, there is no discrimination within the meaning of the Code because there is no discrimination on the basis of sex. (*Written Submissions of OECTA*, at pp. 18-19.)

In her final argument, Counsel for FWTAO stated:

... [C]ompulsory membership in an OTF Affiliate is necessary from a policy perspective for the same reasons that compulsory membership

in a bargaining unit and compulsory payment of union dues are necessary.

... [T]hese policy reasons have particular force where in addition to the normal pressures operating on individuals within society to make decisions which maximize their self-interest instead of the collective good, the realities of gender power direct women toward maximizing their self-interest by identifying with men and failing to promote, even undermining, the collective interests of women.

... [T]his latter problem is a particular consideration in the teaching profession in Ontario at the elementary level, given the gender stratification of the elementary teaching profession in Ontario.

... [I]n light of the evidence before this Board establishing that women, as an aspect of their general social disadvantage, are disadvantaged within mixed-sex organizations, a collective decision by women elementary teachers to pursue the values and benefits of collective activity within an organization of women deserves the same support from public policy as any other collective choice of bargaining agent made by workers.

... [C]ollective bargaining is fostered by public policy for many of the same reasons human rights policy is: to promote human dignity, equality and self-actualization.



... [T]his Board should thus be slow to deprive a women's organization committed to promoting equality of the support public policy allows, and recognizes necessary, to other collective employee associations in order to effectively carry out their functions.

... [A] Board of Inquiry under the [Human Rights] Code should be particularly sensitive to the value of collective activities to overcome disadvantage on the basis of sex in light of the clear policy of the Code to foster special programs to overcome disadvantage on the basis of sex.

... [W]here a *special program* takes the form of a trade union under the Code, that *special program* should be permitted to function within the norms of public policy governing labour relations as those norms do not conflict with values protected by the Code. (3 *Argument on Behalf of the FWTAO*, at pp. 290-291.)

A careful reading of the submissions made by OECTA and FWTAO, in my view, do not present an argument of *preemption of labour relations law over that of the Human Rights Code*. Rather, the submissions suggest interpretations I should give to provisions of the *Human Rights Code*. Specifically, it is argued, I believe, that the provisions of section 6 prohibiting discrimination in an occupational association on the basis of gender should be read first and foremost with a view toward forwarding what those opposing the Complaints have referred to as the general labour policy of this nation. And, FWTAO states that that which should be acceptable as a special program within the meaning of section 14 of the *Human Rights Code* should be influenced by that which labour law would require of an exclusive bargaining agent

and of those in the bargaining unit represented by that agent.

On the one hand, in their arguments, OECTA and FWTAO would recognize the supremacy of the provisions of the *Human Rights Code*. And, on the other hand, they would have the meaning of those provisions determined by labour relations policy as they define that policy.

With respect, I cannot accept the argument as it has been presented. Absent considerations regarding the *Charter of Rights and Freedoms*, the primary, that is, the governing values in the matter before me, having determined that the Complaints were brought in good faith, are those set out in the *Human Rights Code*. It cannot be otherwise. This is not a matter of interpretation. This comes from the express language of the Code, and it also is reflected in the express language of the *Labour Relations Act*, R.S.O., 1980, as amended, of this province.

Section 47(2) of the *Human Rights Code*, noted previously in this decision, provides:

Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act [the *Human Rights Code*] applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

The Ontario *Labour Relations Act* contains no provision ousting the jurisdiction of the *Human Rights Code*. Indeed, quite the contrary is set out for example in sections relating to certification of a bargaining agent and those impacting on collective

agreements:

§13. The [Labour Relations] Board shall not certify a trade union [as bargaining agent] if any employer or employers' organization has participated in its formation or administration or has contributed financial or other support to it *or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code, 1981 or the Canadian Charter of Rights and Freedoms.*

§48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act.

...

*(b) if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code, 1981 or the Canadian Charter of Rights and Freedoms.*

## **2. A Factual Context for Labour Relations Policy: Expert Testimony and the Stipulation Concerning FWTAO's Right to Exist**

Having said this, I want to emphasize that it is appropriate, as I stated in the *Third Interim Decision*, for me to be sensitive to labour relations matters because human rights values are best developed and actualized contextually. If those values are to have meaning, then they must have a relationship to reality. And, certainly, as has

been stated in this decision and in the *Third Interim Decision*, neither FWTAO nor OPSTF functions in isolation. They are part of an affiliate system formally related through an organization recognized in law: the OTF. In this regard, the reality in which the values expressed in the *Human Rights Code* must be applied is *not* that of general labour policy. Rather, it is the reality of labour relations as it exists in education in this province for primary and secondary school teachers.

It is in such a context that I find too much has been drawn by those opposing the Complaints both from the testimony of Professor Weiler and the *stipulation* that the Commission and those supporting the complaints do not challenge the right of the FWTAO to exist as a single-sex professional association.

Let me take each point in order:

(a) Professor Weiler *volunteered* his comments concerning the "intersection" between labour relations policy and human rights "policy." What he had to say was of interest. The fact remains, however, that his qualifications as an expert were sought by FWTAO and were accepted as those of a person skilled in the area of labour law and labour relations policy in Canada and the United States. His Notice of Evidence centred on labour law, certification, and the theory of public good as applied to certification and compulsory membership with specific reference to FWTAO. There was nothing in his Notice of Evidence which focused on human rights policy, as such.

Thus, while there indeed are lines to be drawn between human rights law and labour law, and while the comments of Professor Weiler were instructive, his



expertise insofar as it was presented by FWTAO, for purposes of this hearing, is rooted in labour law.

(b) FWTAO has sought the status of a special program within the meaning of section 14 of the *Human Rights Code*. For the reasons detailed in other parts of this decision, it is my view that, as an organization, it is not such a special program. Nonetheless, by agreement of those supporting the Complaints, there was a firm understanding at the start of these proceedings that they were not to involve in any respect a challenge to the right of FWTAO to exist and operate as a single-sex professional association. I have stated and restated this understanding at various points in this decision.

The understanding means no more and no less than that stated: These proceedings were not to constitute a challenge to the existence of FWTAO or its right to function as a single-sex professional association. Yet, having said this, there appeared to be, in my view, attempts made by those opposing the Complaints to transpose this stipulation to a finding of fact under the *Human Rights Code*, namely: FWTAO had no justification *unless it was on the basis of the organization, itself, being deemed an affirmative action program*.

Professor Weiler in cross-examination by Commission Counsel testified:

Q. I understood your testimony to be proceeding on the basis that the existence of a same sex union, like FW[TAO], would be justified only on the basis that it is [an] affirmative action or a special program in a general sense.

A. Yes, *if it is justified*, it is justified on the basis that it is affirmative action and therefore it is not the kind of discrimination that the law - whatever part of the law we are talking about - is designed to eliminate.

Q. And, I take it that is a question for the Chairman of this Board of Inquiry to decide?

A. Absolutely.

Q. And I also understood that you weren't taking a position on it. Is that correct?

A. My view - the position that I take - is that the benefits and burdens of affirmative action - and clearly there are both benefits and burdens - is something that the members of the group in question have to decide. And, as a white male, historically not the disadvantaged group, I remain somewhat agnostic on that judgment.

...

I am not taking a position pro or con on the specifics of this issue. I am saying, as I said [before], that the legitimacy of this [form] of affirmative action is something that I think is acceptable and established, but the desirability of doing it is something that policy makers other than myself have to decide. (Tr. Vol. 71, at pp. 9499-9500.)

## B. "Freedom Not to Associate" and the *Charter of Rights and Freedoms*

Those opposing the complaints, in argument giving rise to the *Third Interim Decision*, and in final argument relative to this decision, suggested that the matter before me is essentially the same as that which faced the Ontario Court of Appeal and later the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union* (1969), 31 O.A.C. 40 (Ontario Court of Appeal); affirmed, [1991] 2 S.C.R. 211.

The reasoning that caused me to find *Lavigne* inapplicable in the *Third Interim Decision* continues to apply. The holding of the Supreme Court of Canada, if anything, tended to reenforce my earlier judgment both on the facts and the law. In the *Third Interim Decision*, I stated:

. . . Mr. Cavaluzzo [Counsel for OECTA] stated that the issues raised in this case were settled by the decision of the Ontario Court of Appeal in *Lavigne v. Ontario Public Service Employees Union* (1989), 31 O.A.C. 40. There, *Lavigne*, a community college teacher and a member of the bargaining unit, but not a member of the union, brought a *Charter* challenge for the compulsory check-off of a portion of union dues used for non-union purposes [in the view of *Lavigne*]. The Court of Appeal dismissed that challenge. At pp. 63-64, the court held:

Putting *Lavigne's* position at its highest, we shall assume, without deciding the point, that a negative freedom of association is constitutionally protected by s. 2(d) [of the *Charter*].

On that assumption, we are nonetheless of the opinion that the simple requirement of a monetary payment by OPSEU [the Union] is not violative of his freedom not to associate. The compelled payment does not curtail or interfere with any aspect of Lavigne's freedom of non-association or the interests protected thereby. His right not to associate remains unimpaired. He is not forced to join the union, he is not forced to participate in its activities, and he is not forced to join with others to achieve its aims. The compelled payment does not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adapt or conform to the views advocated by the union.

The respondent's payment to the union under the agency shop agreement cannot be construed as placing his stamp of approval on anything done by the union or on any cause to which it might contribute. His individual freedom to associate or not to associate with others, both in opposition to OPSEU and the causes it seeks to advance, remains unfettered by the payment; he remains free to pursue his personal goals. The interest he may have in being left alone or in being unencumbered by any monetary obligation to the bargaining agent selected by the majority of the bargaining unit or in not having any part of his payment to the union, no matter how trivial or insubstantial, devoted to purposes unacceptable to him is not, in our view, an



interest of constitutional status entitled to protection under the *Charter*.

*Lavigne*, in my opinion, assumes the answer to the very question central to these complaints: It was appropriate for the respondent, *Lavigne*, to be *compelled to be a member of the bargaining unit*. It was in that legitimate context that, according to the Rand formula, he was required to pay union dues. In the complaints before me, the question is whether the Complainants can be compelled to remain statutory members of FWTAO, and thereby be precluded from becoming statutory members of OPSTF solely by reason of their sex. Incident to that statutory membership on the facts of the record to date is the requirement of the payment of a fee initiated by the statutory affiliate, payable to the OTF, but a portion of which is returned to the designated affiliate.

Accordingly, at this point in the proceedings, I do not find *Lavigne* dispositive of the issues raised in the complaints. (11 C.H.R.R., at D/236.)

The judgment of the Supreme Court of Canada in *Lavigne* came in the form of four opinions from the seven deciding Justices. The first question though not relevant to the matter before me can be stated as: Was there government action of the kind which would attract *Charter* review? The answer from all seven Justices was *yes*. The school was seen as a Crown employer and *Lavigne* was held to be a Crown employee.

It was the second issue, the freedom not to associate, claimed by Lavigne to be included within the meaning of section 2(d) of the *Charter* which those opposing the complaints argue is relevant here. The Ontario Court of Appeal, as I stated, assumed that the freedom not to associate is embraced within the meaning of section 2(d). It found that the mandatory payment of dues in accord with the Rand formula and, as such, it was not an interest of the kind protected under section 2(d).

Before proceeding with an analysis of the Supreme Court of Canada decision, there are some points of further clarification that relate both to the *Third Interim Decision* and Part I of this decision: (1) In Part I, there was discussion about the application of *Charter* jurisprudence to this matter. I stated, in effect, that while a decision of this Board of Inquiry clearly would be government action and, as such amenable to *Charter* review, this case had been presented solely on the law relating to the *Human Rights Code*. My decision, I stated, would be based on the law relating to the *Human Rights Code*, though I might well look to *Charter* decisions as an aid in interpretation. (This approach was all the more necessary bearing in mind the possible defences, if appropriate, under section 1 of the *Charter*.)

(2) The substantive issue I must decide is one of discrimination on the basis of sex within the meaning of section 6 of the *Human Rights Code*. That is, the Complainants assert that *they are compelled to be statutory members of FWTAO solely because of their sex, with the result that they are denied the right to become statutory members of OPSTF*. Theirs is not a claim similar to that of Lavigne. The Complainants here do not accede to the *propriety of the bargaining unit as applied to them*. In effect, Lavigne did not dispute the propriety, that is, the legality of the bargaining unit. He questioned how certain funds, portions of which came from his

membership fees, were spent.

Now, let me proceed to an analysis of the Supreme Court of Canada's decision. (The discussion will centre on section 2(d) of the *Charter* and its guarantee of the right of freedom of association. An issue was raised as to whether and to what extent section 2(b) dealing with, *inter alia*, freedom of expression applied to Lavigne's claim. All members of the Court agreed that the payment of union dues on the facts of the case did not constitute expression or opinion within the meaning of section 2(b), though Justice Wilson nonetheless set out her views as to section 1. In effect, she said, any restraint on freedom of expression would be deemed justified within the meaning of section 1.)

For our purposes, it can be said that a majority of the Court did agree as to basic elements of rationale concerning section 2(d). This majority statement can be found in the opinions of Justices LaForest and McLachlin. The opinion of Justice LaForest was concurred in by Justices Sopinka and Gonthier. Justice McLachlin wrote separately. The two opinions agreed that the compulsory payment of union dues in support of activities not directly related to the collective bargaining relationship can be subject to the protection of section 2(d). That is, there can be a right of freedom not to associate as being included within and as a part of the right to associate. They differed sharply as to whether that right attached bearing in mind the Rand formula and its application.

Justice LaForest found that that right in fact existed and was violated in terms of Lavigne. He held that Lavigne was forced to associate with causes to which he did not agree. Extracts of Justice LaForest's opinion follow:

It must be recognized that there is a vast difference between saying that the *Charter* does not entitle a person to artificial isolation from his or her co-workers, and saying that that person never has a right to object to the extent or nature of his or her association with them. To bring the discussion down to earth somewhat, I would suggest that a worker like Lavigne would have no chance of succeeding if his objection to his association with the Union was the extent that it addresses itself to the matters, the terms and conditions of employment for members of his bargaining unit, with respect to which he is *naturally* associated with his fellow employees. Few would think he should not be required to pay for the services the Union renders him in this context. Significantly, he does not object to these matters. With respect to these, the Union is simply viewed as a reasonable vehicle by which the necessary interconnectedness of Lavigne and his fellow workers is expressed.

When, however, the Union purports to express itself in respect to matters reflecting aspects of Lavigne's identity and membership in the community that go beyond his bargaining unit and its immediate concerns, his claim to the protection of the *Charter* cannot as easily be dismissed. In regard to these broader matters, his claim is not to absolute isolation but to be free to make his own choices, unfettered by the opinion of those he works with, as to what associations, if any, he will be associated with outside the workplace. (*Id.*, at 329-330.)

....



In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the *Charter* to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit. . . . [T]his distinction derives logically from the fact that the reason the forced association is permissible is because the combining of efforts of a particular group of individuals with similar interests in a particular area is required to further the collective good. When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association. (*Id.*, at 332-333.)

Justice LaForest then turned to section 1 of the *Charter* to determine whether the violation of freedom of association as applied to Lavigne could be justified. In the result, Justice LaForest saw a public policy encouraging democratic unionism where there is a right to dissent in the context of majoritarian rule. To permit a non-member to opt-out from making payments which he/she finds objectionable, might undermine the membership base. Justice LaForest stated:

The problem with the opting-out formula is that it could seriously undermine unionism's financial base. It could perhaps even undermine its membership base, since its availability would be an incentive to refrain from becoming a member, since, presumably, one of the present advantages of membership is that one gets a vote on how one's money will be spent. This would obviously be less attractive

if one could unilaterally prevent one's money from being spent on matters of which one disapproves. I would add that the ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism." (*Id.*, at 336-337.)

Justice LaForest spoke in a context where there were *two fundamental choices* open in terms of membership: (1) A bargaining unit, having been circumscribed as to *community of interest*, a majority, at designated but ongoing points, could oust the bargaining agent. (2) The Rand formula was established in no small part to allow individuals such as Lavigne to decline membership in the union but, at the same time, to pay their fair share for the benefits of representation.

Such is not the reality in the matter before me: (1) There is no statutory right of decertification. Under the terms of a private regulation, OTF By-Law 1, *based solely upon their sex, female public elementary school teachers must be members of FWTAO, and male public elementary school teachers must be members of OPSTF*. They have no choice. If Lavigne had chosen to be a member of the union, that was his right in law. And, as a member he could have argued against the kind of payments he thought improper. Indeed, he could have pressed for decertification and the designation of no union or another union as the bargaining representative. (2) Lavigne, within the meaning of the Rand formula, had the *individual right not to be a member of the union, though he could not avoid the price for the benefits flowing from representation*. The Complainants in the matter before me cannot opt out of statutory membership on the basis of sex. They do not have the choice for which the Rand formula was designed. They cannot change their statutory

membership and pay the price for representation by whomever would be their bargaining agent.

Justice McLachlin found that the payment of dues, precisely because of the intent and substance of the Rand formula, removed Lavigne from the protection of section 2(d). That is, the Rand formula separated membership from the payment for a service, namely, the representation of Lavigne along with other members of the bargaining unit. Justice McLachlin wrote:

Assuming that a right not to associate exists, it follows from what I have already said that its purpose must be to protect the interest of individuals against *enforced ideological conformity*. Does the requirement that Lavigne make payments to the Union, which the Union may thereafter spend in part in support of causes which Lavigne does not support, fall within this interest?

In my view, it does not. The test, as set out above, is whether the payments can reasonably be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe. The payments here at issue do not meet this test because under the Rand formula there is no link between the mandatory payment and conformity with the ideas and values to which Lavigne objects.

....

... [T]he whole purpose of the [Rand] formula is to permit a person who does not wish to associate himself or herself with the union to desist from doing so. The individual does this by declining to become a member of the union. The individual thereby dissociates himself or herself from the activities of the union. Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union. *But the payment is by the very nature of the formula bereft of any connotation that the payor supports the particular purposes to which the money is put.* ... By the analogy of commerce, the payor is simply paying for services and benefits received. (*Id.*, at 346-347.)

(I have not discussed the opinion of Justice Wilson as it relates to the freedom not to associate which was concurred in by Justices L'Heureux-Dubé and Cory. The reason is that that opinion took the view, as a threshold matter, that the freedom not to associate was not included within the meaning of the freedom to associate. The result was that the import of the Rand formula with its separation of membership from payment for services for union representation which may have some bearing in the matter before me was not under this heading.)

As I stated, there is not, nor can there be a separation of statutory membership from the payment of dues for the Complainants within the meaning of By-Law 1. Employing the rationale of the opinions of Justices LaForest and McLachlin, are there possible section 2(d) *Charter* concerns for the Complainants? I believe that there may be such concerns, though I certainly do not make findings on the point. Rather, my intent to set out how *Lavigne* might impact on this case.



The facts are that FWTAO wants all female public elementary school teachers to continue as statutory members not only for the sizeable and stable income base they provide, but also for the *power that comes from being able to speak for such a group. And, in this regard, such power transcends individual boards of education. It relates as well - and perhaps more importantly - to interfacing with: government at all levels; other Affiliates; and public and private interest groups.* The power to speak, as it has been described by FWTAO, itself goes beyond the traditional role of a collective bargaining agent. FWTAO sees itself - and quite properly so within the meaning of its founding documents and its history - as an organization that can and does address broad societal concerns. To that extent, then surely statutory members are made to be a part of such expression, for FWTAO's power in part derives from being able to speak for all female public elementary school teachers.

Barbara Richter, an FWTAO administrative assistant, called by that organization as a witness, gave the following testimony in direct examination which reflects some of the importance to FWTAO with being able to speak for all female public elementary school teachers, who in 1990 numbered about 40,000:

Q. Based on your field experience what is your general impression of FWTAO's reputation in the educational community?

A. From my experience I would say that FW[TAO]'s reputation in the community is quite high. I have had experiences at trustee conferences, or outside the organization, where people, trustees and superintendents who don't know me particularly, where I have been representing

FWTAO have come up and talked about how much they have appreciated some of the issues FWTAO has raised, and they have appreciated a lot of the material that FWTAO has produced.

Q. How do you feel that activity and leadership of FWTAO is viewed by the educational community as a whole?

A. I think it is viewed very positively as a whole, and the people who are participants in any of these leadership functions are actually valued quite highly.

Q. Do you think any of that will change if FWTAO members were permitted to opt out of FWTAO and choose another affiliate?

A. I think it would certainly change the perception of the educational community toward FWTAO because immediately there would be a question as [to] whom FWTAO represents. It would be an organization unlike the other federations which would still have a foundation, a basic membership. FWTAO would be an organization built on shifting sands. For something like that to happen it would be, in my opinion, there is the potential for the educational community to then take FWTAO less seriously than it takes the other organizations, because FWTAO would be treated differently in the context of the teacher federations. I think there would always be a question whenever FWTAO represented its members. The first question that would be asked by many of these people and many of these partners in

education, would be just who is it you represent now. I think given the fact that we are still working towards social change that this would be a fundamental blow to women's equality in this province.

THE CHAIRMAN: How could there be any real question as to whom FWTAO represents? The entire thrust of your testimony, at least as I have heard it, would seem to me to be quite clear in terms of women's interests. How would that change?

THE WITNESS: I think it would change in terms of women's interests in the context of the whole structure right now in education. FWTAO would be the organization that would no longer have a mandatory membership base. At least there would be choice and there would not be choice [in] any of the other organizations. There would still be an organization for men teachers who would be perhaps recruiting women. And at any given time it seems to me that it is a legitimate question for outside agencies to ask who is it that you represent because your membership no longer is a firm membership: Are you really representing women's interests? (Tr. Vol. 42, at pp. 5890-5892; see also, the testimony on direct examination of Kay Sigurjonsson, FWTAO Associate Executive Director, Tr. Vol. 45, at pp. 6365-6368.)

For the reasons stated, I find that the *Lavigne case* is not relevant to the issues I must decide. While it is true that *Lavigne* was concerned with the *Charter* legality of compelling the payment of dues for what may be styled non-traditional collective bargaining purposes, the case assumed the propriety of the bargaining

unit. In the matter before me, that very propriety is questioned on the ground of sex discrimination.

Moreover, in the context of section 2(d) of the *Charter*, the Rand formula played a central role in the disposition of *Lavigne* by the majority of the seven-member Supreme Court of Canada panel. Lavigne had chosen not to be a member of the union within the meaning of the Rand formula. He paid dues solely for the purpose of carrying his fair share of the costs of representation. The Complainants in the matter before me did not have that advantage under a Rand formula. They must be statutory members of a union without regard to their choice and solely because of their sex.

## **C. The Labour Relations Aspects in this Matter**

### **1. The Facts**

In the *Third Interim Decision*, I found that, as an organization, OPSTF is committed to amalgamation with FWTAO and, indeed, beyond that it is committed to the establishment of a single teaching federation without Affiliates. Thus, there can be no real question that this human rights case, if successful, works in favour of the long-term institutional goals of OPSTF.

Yet, at the same time, I found in the *Third Interim Decision* that the individual complaints brought by the Complainants in this matter were real and that they, as individuals, based on the evidence, did indeed suffer discrimination on the basis of gender and injury to their dignitary interests. I referred to these points in Part I of



this decision. Nothing on the record made following the *Third Interim Decision* has caused me to reverse the views there expressed. Indeed, such views have been confirmed through, for example, the expert evidence of Professor Epstein insofar as there is a relationship between injury to dignitary interests and "symbolic segregation," quoted in Part I of this decision.

In the *Third Interim Decision*, I stated:

. . . nor is there any real doubt, again based on the evidence thus far presented, that the OPSTF fee schedule for voluntary members has been set at a low level which will encourage affiliation on the part of FWTAO statutory members.

The reason for such encouragement can be found in the Constitution of OPSTF. Under Article III - Object, the OPSTF has bound itself to: "9. promote as a long-term goal the unification of all teachers in the Province of Ontario into a single unified body without affiliates (1983). [and] . . . 12. to promote voluntary membership in OPSTF (1985)." To carry out these objects, a committee was struck, The terms of reference of that committee were "to actively promote the unification of all teachers teaching all or a major portion of their assignments in the public elementary schools in which English is the language of instruction into a single unified affiliate." Ms. Logan-Smith testified:

Q. And, if I am reading this correctly, and you can tell me whether you read this in the same way: No. 1 is the immediate goal of a single

unified affiliate for public elementary teachers, and No. 2 is a longer term goal of one group representing all teachers in Separate Schools, in Francophone schools, in secondary schools, as well as elementary schools.

Is that the way you read it?

A. One is a short term goal and one is a long term goal.

Q. Do you share both those goals?

A. Yes. I do.

The organization that would represent all Ontario teacher interests would be OTF. In effect, it would become a bargaining agent for all teachers. The five Affiliates would cease to perform this role; they would no longer function as bargaining agents [in fact, if not in law]. Any significant change in the existing method for determination of Affiliate dues and their allocation might have an important impact on bargaining unit status. I recognize this. I am sensitive to the labour relations implications of these proceedings.

Yet, at the same time, I must emphasize the obvious: I function as a Board of Inquiry and, as such, I am charged with examining the complaints made under the *Human Rights Code*, which constitutes general legislation. . . . (11 C.H.R.R., at D/234.)

## 2. A Contextual Reality for Human Rights Values: Labour Relations

In the *Third Interim Decision*, I sketched the bargaining profiles of FWTAO and OPSTF. The underlying reality is that female and male public elementary teachers work as colleagues in the same school under one principal and usually one vice-principal, both of whom are statutory members of either Affiliate, depending on their gender. This central fact, namely, of a shared working experience, over the years has produced joint bargaining out of which, without exception, has come a single collective agreement binding upon both the branch affiliates of FWTAO and OPSTF.

This is not to deny that the WTA (the local or branch affiliate of FWTAO) might not bring to the table specific issues, or, for that matter, that OPSTF might not bring to the table specific issues. But, the table in this instance is the Economic Policy Committee in which both Affiliates have equal representation. This means that one Affiliate cannot force an issue to bargaining which the other does not want. Each may be the exclusive bargaining representative of its particular constituency. But, there can be little question that it is the joint operation of the Economic Policy Committee that carries forward commonly-agreed policy to the bargaining table with a view toward obtaining an agreement with the relevant employer group.

In the *Third Interim Decision*, it was stated at 11 C.H.R.R. at D/231:

In this regard, viewing the record as a whole, it is fair to say that both Complainants have not found themselves disadvantaged by their bargaining representative as to the terms and conditions of their

employment. In no small measure the reason goes to the flexibility of affiliate representation and bargaining processes. The reality in Ontario seems to be that there is joint bargaining by local branch affiliates of OPSTF and FWTAO. This often is done through a local Economic Policy Committee, a given number of the members of which are elected by each branch affiliate. Indeed, using the York Regional Board of Education collective agreement as an example, the recognition clause states in part:

*The Board recognizes the branch affiliates as the sole and exclusive bargaining agents for teachers as defined in Article B . . . and further recognizes the negotiating committee of the Economic Policy Committee of the branch affiliates as competent to represent all of the Elementary Teachers employed by the Board.*

The net result of this process is that the collective agreements for OPSTF and FWTAO provide for precisely the same terms and conditions of employment within the meaning of any collective agreement.

It is possible, too, should the branch affiliates within any local region so agree, for amalgamates to be formed which can be permitted to represent the affiliates. The evidence indicates that thirteen such affiliates [amalgamates] existed in the province in 1989. Indeed, as a matter of law, Bill 127 requires combined bargaining as to central issues



for Metropolitan Toronto. Though no illustration was offered, it is theoretically possible for there to be individual bargaining by the branch affiliates. I emphasize, however, that this is a theoretical possibility insofar as the evidence to the date of the motions to dismiss is concerned.

A central fact in these proceedings is the bifurcation of public elementary school teachers based on their gender. This division, it must be emphasized, was not the result of legislation. Rather, it derives from *private regulation, namely, By-Law 1 of the OTF. Whether this division is a conscious reflection of public policy is an entirely different question. The fact is that neither an agency of government nor the legislature, as such, have ruled on the matter.*

None of the expert witnesses were able to point to a comparable structure in Canada or the United States. Professor Weiler, with deep academic and practical experience in Canada and the United States, had the following exchange with Counsel for OSSTF:

Q. . . . [T]urning to the area of exclusivity and constituency that has to be dealt with when one is creating collective bargaining, I understood from your evidence that you said there are basically two ways in which a constituency - a bargaining constituency - is defined. One is by the tribunal developing criteria - the concept of community of interest . . . ; the second is by the legislation itself in fact establishing a constituency.

I'm correct so far?

A. Yes.

Q. Am I correct that in North America it is unusual, to say the least, to find a situation where the legislation leaves it to the private actions of an organization of employees to decide the constituencies themselves. That is more akin to, if anything, the British or European system?

A. It is unusual in the North American context.

Q. In fact, I don't know whether you are able from your own bargaining experience to point to any that you know of where legislation is left up to the employees through some form of organization to establish their own bargaining constituencies?

A. The actual experience that I am aware of both in this province and in other parts of Canada and, indeed, I dare say in many places in the United States is that where the bargaining structure is not specified by a labour board under umbrella labour relations legislation but instead is the focus of specially tailored legislation, then in those situations the legislature writes into law the bargaining structure that had previously been developed by the parties.

One sees that, for example, in the police, fire fighters, the Ontario Provincial Police, and you see it with respect to teachers all across the country. The ability of the individual organization . . . to revise that unilaterally, that is unusual, but the ability of the parties in the field

to revise their own arrangements and go back to the legislature for fairly easy to get legislation that revises it, that is not at all unusual in the public sector context. (Tr. Vol. 71, at pp. 9479-9480.)

### 3. Expert Evidence Applied to Public Elementary School Teachers

For the application of labour relations policy, those opposing the Complaints called as their key witness Professor Weiler. His Notice of Evidence is set out as Exhibit 614. It purports to describe that which was to constitute his testimony. Such had been the agreement by and between Counsel in this matter. Nowhere in that Notice of Evidence is there any discussion, as such, concerning compulsory membership in a professional association on the basis of gender. Nor is there any discussion concerning the *absence of a right to oust an incumbent bargaining representative and either select another or to opt for no representative at all.*

Rather, Professor Weiler recounted the rationale for that which is the *generalized* labour policy of Canada. (I use the word *generalized* to indicate that the OTF and the Affiliates realistically, as well as in law, have a unique structure for collective bargaining, some of which was mentioned in the previous sub-section as well as that dealing with the application of the *Lavigne case, supra.*) He explained the genesis of and the continued need for the designation of an *exclusive* bargaining representative, able to speak for all members of a designated bargaining unit where there is a community of interest. As applied to Canada, Professor Weiler addressed the development of and continued use of the Rand formula. (See, Exhibit 614, at p. 5.) However, in this regard, I note that Professor Weiler did not focus his analysis as to the meaning of the *absence of the Rand formula for public elementary school*

*teachers. They do not have the "Rand choice" of being able to choose to pay dues and to abstain from statutory membership in an Affiliate on the basis of gender.*

Rather, Professor Weiler seemed to have subsumed the validity of such compelled statutory membership when he turned his attention to the so-called "free-rider," the person who takes the benefits flowing from collective bargaining and the efforts of the bargaining representative without paying for them. He stated in his Notice of Evidence, at ¶13, p. 6, Exhibit 614:

It has seemed unfair to allow any one employee to enjoy such benefits as a *free-rider* upon the efforts of all his or her co-employees in what often is a difficult struggle with the employer. More importantly, there is an additional, longer-run risk of damage to the overall enterprise. As other employees see someone else getting the benefit of collective action without paying any of the necessary costs, they will naturally be tempted to follow that example. As each of them chooses to do so, the size of the union's resources may soon diminish to the point where it significantly depresses the overall achievements. As the benefits of collective action start to decline, this adds further to the temptation of more and more employees not to pay the necessary costs, and a vicious circle can set in. The whole point of union security provisions is to try to prevent this possible scenario from ever getting underway.

Professor Weiler refers to the benefits of the sort unions produce in the language of economics as *public* or *collective* good. That is, as applied to FWTAO, according to Professor Weiler, as an association it produces benefits for all women public



elementary teachers - without regard to whether they want those benefits. (Exhibit 614, at ¶14, p. 7.)

The rationale of the Rand formula demands that those in the bargaining unit (women public elementary teachers) pay their fair share of the costs flowing from the benefits they derive through the collective bargaining efforts of FWTAO. (Exhibit 614, at ¶16, p. 7.) Indeed, Professor Weiler emphasized that such benefits obtained by the bargaining representative can (and in the case of the Affiliates do) go beyond the collective agreement, as such. They relate, for example, to pensions, occupational health and safety, workers' compensation, unemployment insurance and professional development. (Exhibit 614, at ¶17, p. 8.)

In the final two paragraphs of his Notice of Evidence, Professor Weiler referred *specifically* to FWTAO and how, in his view, the policy and rationale he had outlined applied to the statutory members of that association:

18. This analysis can similarly be applied to the system of representation for public elementary teachers in the province of Ontario.

I am advised that local branch affiliates of the Federation of Women Teachers' Associations of Ontario negotiate jointly with local branch affiliates of the Ontario Public School Teachers' Federation for one collective agreement which covers all elementary teachers employed by a school board. I am also advised that there is a range of collective bargaining issues which have specific impact on women elementary teachers and that the existence of a separate women's association helps to ensure that these issues will be pursued at the bargaining

table. These issues include maternity leave benefits, calculation of seniority in relation to breaks in service, equitable treatment of part-time teachers, and affirmative action. Benefits negotiated in these areas are a collective good which will be available to to all women elementary teachers covered by the relevant collective agreement.

19. I am further advised that there is a range of other issues affecting women elementary teachers which are not addressed in collective bargaining and which the Federation of Women Teachers' Associations of Ontario pursues in other fora. For example, I am advised that the Federation is extensively involved in dealings with government and with boards of education on a number of issues affecting women in education, including: (1) affirmative action; (2) superannuation as it affects women teachers; (3) educational issues specifically affecting girls and women, such as sex stereotyping in texts and other educational materials; (4) making technology in the classroom accessible to girls; and (5) sexual abuse of students. I am also advised that the Federation produces curriculum materials and literature which address issues specific to women and girls in education. These activities are classic examples of *collective goods* from which all women in education benefit. (*Id.*, at pp. 8-9.)

The information made available to Professor Weiler to which he applied the theory of collective or public good to FWTAO, though relevant and important, was limited. He reviewed the Notices of Evidence of about five witnesses and the evidence, including several documents attached thereto, of Dr. Henderson, a former executive

director of FWTAO, much of whose testimony was discussed in Part II of this decision, as well as the handbook of the OTF. (Tr. Vol. 70, at p. 9413.)

Those limits, however, have a significant impact on the assumptions underlying Professor Weiler's conclusions. Under section C(2) of this part of the decision, I restated the findings in the *Third Interim Decision* concerning the nature of collective bargaining by OPSTF and FWTAO with boards of education. I said there that such bargaining is done on a joint basis and that historically it has resulted in a single collective agreement applicable to both female and male public elementary school teachers.

Professor Weiler was of the view (a) that OPSTF would not bring to the bargaining table any substantively different matters of interest and value to women colleagues which would not otherwise have been forwarded by FWTAO. (b) Further, he said that FWTAO would bring to the bargaining table important issues of special concern to women which would not be pushed by OPSTF. He testified:

A. I would doubt that OPSTF would bring matters to the bargaining table for her [a statutory member of FWTAO] benefit that are different from the ones that are brought to the table by the [FWTAO].

Q. You think they would bring the same issues?

A. I think they would bring the same issues and [the FWTAO] would bring rather different issues as well. (Tr. Vol. 71, at p. 9459.)

Theoretically, Professor Weiler's conclusions have a ring of validity. However, those conclusions lose force when applied to the real lives of the parties. Professor Weiler's conclusions are, as noted before, based on a number of assumptions, one of the most important of which is that FWTAO as an organization functions in the traditional sense as exclusive bargaining representative for a well-defined and cohesive bargaining unit. The historic reality of joint bargaining between FWTAO and OPSTF through joint economic policy committees as well as the establishment of amalgamates which will be more fully described in the next section of this decision evidence something quite unique, a hybrid form of exclusive bargaining that finds no analogue in Professor Weiler's experience, nor that of any other expert witness called by the parties. (Tr. Vol. 71, at pp. 9481-9482.) Indeed, the absence of an analogue related not just to the certification of a bargaining unit based on gender, but also certification of two bargaining units where the same work (teaching) was being done in the same location (an elementary school) for the same employer (a school board). (Tr. Vol. 71, at p. 9437.)

A result of this combined bargaining at the table of the joint economic policy committee is a give and take between individuals, sometimes elected by individual branch affiliate membership, and sometimes by a combined membership meeting. How can it be said that the neat division suggested by the collective or public good theory applies in such a situation?

Professor Weiler stated that, especially in the negotiation of a collective agreement, conflicts can arise between interests within the bargaining unit. If a union is to get on with its business as bargaining representative, it must be able to resolve such conflicts in ways that may benefit some and not others. But, what happens when



the others - and I am speaking about women - are a significant minority, subject to the will of the majority. At other points in this decision, I referred to two such illustrations which occurred at various times in the history of FWTAO. I again review them, but I do so only for the purpose of inquiring as to the relevance of the collective or public good theory as applied to FWTAO.

In my view, real questions arise in terms of determining when a collective or public good should be deemed to exist. That is, does every important women's issue necessarily carry with it the imprint of public good? What is the public good when there are conflicting interests within a women's organization, and the resolution of the conflict is determined by a majoritarian process? And, there is a question as to the reality of deeming exclusive authorship and sponsorship in a women's association where other groups (mixed-gender Affiliates) not only undertake to act in the interests of its female members (statutory or voluntary), but take a very different course in doing so.

Now, I will set out the two illustrations, described more completely in other parts of this decision:

(a) For a long period, there was express discrimination against married teachers. It was the kind of discrimination which found acceptance, at least for short periods, by a majority of FWTAO members who then were single. It found that acceptance, in part, during difficult economic times when jobs were scarce and boards of education not infrequently cut salaries. The perception among many members of FWTAO seemed to be that married women had other means of support. They were seen as an economic threat. Putting aside any application of human rights legislation, how

can it be said that a majoritarian choice exercised democratically in favour of single teachers is a public good for all women elementary school teachers?

Indeed, in such a situation would it not be better to have a measure of competition between Affiliates where a significant minority of women teachers could put forward their own interests even perhaps through another professional association? Under what might be called traditional labour law, it is always possible for a clearly identified group with a real community of interest to attempt recognition and certification of a bargaining representative.

But, traditional labour law does not apply to the OTF and especially to FWTAO and OPSTF. Under By-Law 1, the bargaining unit is set *a priori* on the basis of gender. And, there can be no change in the nature or configuration of that bargaining unit except through a *province-wide majoritarian expression of the membership through their designated delegates*.

(b) A more current example is the initial approach by FWTAO to the non-degreed teachers, the overwhelming number of whom were female. They were placed at the bottom of the salary grid in the so-called B, C and D categories. They could only move to the higher categories if they obtained an undergraduate degree, a requirement made in 1972 with an effective date in 1973.

FWTAO chose to encourage such teachers to upgrade their education, to obtain an undergraduate degree. This was done, according to Ms. Wescott, Executive Director of FWTAO, through bursaries. The end result, however, as was recounted earlier in this decision, did not bring any major change in the status of the B, C and D teachers.

As an FWTAO staff worker put it, formal studies coupled with their jobs and other responsibilities simply did not fit the life styles of most of them.

In discussing this topic earlier, I emphasized that I intended no criticism of FWTAO. It made an organizational choice, and it did so ostensibly on the basis of responsibility to the majority of its membership. The point is: Can it be said that that choice was in the interests of all female public elementary teachers? Certainly for the large number of B, C and D teachers, the choice did not serve their short-term interests.

Now, how is the public or collective good to apply if a mixed-gender union - in this instance, OSSTF - argues and bargains for the elimination of the B, C and D categories? How is the public or collective good to be perceived in relation to women's issues? Further, bearing in mind that all statutory members of OTF are required to pay dues (which are deducted from their salaries), how is payment allocation to be made for other women who might receive the benefit, the public good, obtained by OSSTF? And, how does one divide and attribute the relative worth of the sum total of the public good between Affiliates that are responsive to the interests of their female members?

In the result, for the reasons stated, I have considerable difficulty applying the collective or public good theory to the real life conditions of public elementary school teachers, even in the context of the implementation of a labour policy independent of overriding human rights considerations.

## D. Amalgamates

The lines of separation are not so simple as those between men and women public elementary school teachers who are statutory members of either FWTAO or OPSTF based on their gender. Such lines exist. But, other lines have also been drawn that influence organizational shape. In the *Third Interim Decision*, I referred to *amalgamates*. I did this as part of the findings leading to the conclusion that neither Complainant in this matter was disadvantaged because of bargaining representative. At 11 C.H.R.R. D/231, it was stated:

It is possible, too, should the branch affiliates within any local region so agree, for amalgamates to be formed which can be permitted to represent the [Branch] Affiliates. The evidence indicates that thirteen such [amalgamates] existed in the province in 1989. Indeed, as a matter of law, Bill 127 requires combined bargaining as to the central issues for Metropolitan Toronto . . . .

Bill 100 - the *School Boards and Teachers Collective Negotiations Act*, R.S.O., 1980, Ch. 464 - sets the broad statutory framework for collective bargaining. It does not designate either OTF or the Affiliates as bargaining representative. Section 5 of the Act provides: "A *branch affiliate* shall, in negotiations and procedures under this Act, represent all the teachers composing its membership."

Thus, the Act designates the branch affiliate as the bargaining representative. Further, the Act gives substantial breadth to branch affiliates to combine for the purpose of bargaining jointly with one or more boards, as well as other procedures



incident to the Act:

§4(1) - In negotiations and procedures under this Act to make or renew an agreement or agreements, two or more boards may act jointly as a party and *two or more branch affiliates may act jointly as a party, where both the boards and the branch affiliates involved so agree, to make or renew an agreement between the boards and the branch affiliates or to make or renew a separate agreement between each of the boards and a branch affiliate that represents teachers employed by the board.*

As noted, amalgamates reflecting branch affiliate combination between FWTAO and OPSTF have come into being. In many ways, they can be seen as entities both independent of and related to their provincial Affiliate. Though their shape can and does differ, amalgamates have their own constitution, by-laws, and administrative infrastructure. They develop their own budgets and, except for monies specifically ear-marked for designated uses by that *rebated to them by their provincial affiliate*, they will spend funds as they as organizations through their own elected officers see fit.

Provincial affiliate control largely is manifested through giving or withholding support services and, probably more important, setting conditions over the use of rebated membership fees in accordance with formulas each Affiliate has developed. Putting it somewhat differently, for all practical purposes each Affiliate sets its own statutory membership fee. This is done as well with a view toward the amount of that fee which will be designated for OTF use. The fee proposed is then approved by

the OTF Board of Governors, with the approval of the Lieutenant Governor in Council. Monies are withheld from teacher salaries and passed on by their employer boards to the OTF which, in turn, forwards the sums to the appropriate Affiliate minus the OTF share.

The Affiliate then, pursuant to member-approved resolutions following a specified formula, rebates a portion of membership fees to the branch affiliates. FWTAO maintains a greater proportion of its overall budget for provincial programming than OPSTF which rebates greater amounts to its branch affiliates. (Tr. Vol. 90, at pp. 12419-12420.) Some amalgamates supplement the monies from rebates with either voluntary contributions or levies on members. (The Toronto Teachers' Federation has voluntary contributions. And the evidence was that about 20 percent of its members, both male and female, do not contribute. Tr. Vol. 87, at p. 12103.) The Toronto amalgamate has developed its own full-time administrative infrastructure. (See, for example, Tr. Vol. 88, at p. 12151.)

On the whole, the record focused on two amalgamates: the Toronto Teachers' Federation (TTF) and the Teachers' Federation of Carleton (TFC). There may be some value to sketch briefly the organization of each and the interface of each with provincial Affiliates. My purpose in doing this is only to indicate the complex nature that organizational structure can take. And this tends to underline, in my view, the difficulty in any attempt to compare OTF and its Affiliates, and especially the public elementary school affiliates, with organizations subject to regulation by what might be called general labour policy as reflected in Ontario's *Labour Relations Act*.

Both the TTF and the TFC memberships are primarily female. For example, it was estimated that the TTF membership ranged between 70 and 75 percent. (Tr. Vol. 88, at pp. 12158-12159.) Both were formed in 1967. It is fair to say that both have as a central organizational goal the establishment of a single federation representing teachers. The constitution of TTF provides in Article II - Objects:

2.1.8.0 - to promote the formation of a single Ontario Teachers' Federation. . . . (Ex. 785, Tab 1.)

In the TTF, the branch affiliates of FWTAO and OPSTF remain as entities. Under the TTF constitution, the president of each branch affiliate serves, *inter alia*, as a member of the grievance appeal board and the negotiations resource committee. (Articles 8.4 and 8.5.) In addition, the constitution designates the branch presidents as "voting liaison members of the [TTF] Executive." (Article 5.2.1.0.) The expectation would appear to be that some kind of constructive communications is to be maintained with the provincial affiliates.

Under the TFC, both branch affiliates are reduced to the status of committee. An important goal of the amalgamate is the elimination of FWTAO as an entity as a step in the creation of a single elementary teachers' federation. And, an interim measure in this regard from the TFC viewpoint is allowing female public elementary school teachers choice of Affiliate. Such was the clear thrust of the testimony of Penny Hammond, a former president of the TFC. (Tr. Vol. 82, at pp. 10917-10920.)

Both amalgamates have become the bargaining representative in collective

agreements with school boards. The TTF, for example, has been designated as agent for its branch affiliates of FWTAO and OPSTF. (Tr. Vol. 85, at p. 11792.)

There was testimony by way of cross-examination of amalgamate witnesses that principals had an important role in urging the establishment of the TTF and the TFC. Further, there was some testimony that at least as applied to the TFC principals played a socializing role in encouraging formation of the amalgamate. All of this may be true. But it does not compel the conclusion that the amalgamates with female majorities ranging from 65 to 75 percent, all of whom are professional teachers, after more than two decades of organizational existence are in any way intimidated to maintain their membership. (Having said this, I am fully aware that a principal does have a position of power, and that most principals are male, though employment equity is having some measurable impact on this. I also note that principals are a part of each Affiliate. That is, they are a part of the bargaining unit.) (See, Tr. Vol. 94, at pp. 13172-13176 relating to the TFC.)

I come now to what must be seen either as provincial Affiliate influence or control over the amalgamates. I shall use as an illustration grievance procedures under the collective agreement. The resolution of such disputes is the use of the rule of law. It is a way to hold both a board and the teacher, through the bargaining representative, if necessary, to a binding decision through arbitration. Yet, the cost of arbitration can be substantial. Even for a large-membership amalgamate such as the TTF, funding arbitrations can be difficult. The assistance of the provincial Affiliate can be helpful, to say the least.

The fact is, however, that both provincial Affiliates established rules for all of its



branches relating to funding arbitrations. Common sense dictates that reasonable rules governing when and how such funds would be made available is both a necessary and desirable course in terms of conserving member funds and ensuring compliance with organizational substantive policy. However, both Amalgamates have their own procedures. And, for the most part, those procedures simply do not permit them to comply with provincial Affiliate policy to obtain support. For example, FWTAO insists on the use of its designated counsel in terms of representation. TFC has rules which require it to use its designated counsel. I draw no adverse conclusions from this.

The amalgamates exist, and they have draw additional lines to the organizational parameters of FWTAO and OPSTF. The amalgamates are independent up to a point. And, that point probably bears a correlation to its money needs. While the amalgamates can and do raise funds of their own, the reality is that the greater financial resource is to be found in the provincial Affiliates.

## **E. Predictions If Choice Is Allowed**

Professor Weiler was asked his opinion as to the future of FWTAO as well as OTF should female public elementary school teachers be permitted to choose between FWTAO and OPSTF. As noted in other parts of this decision, this was a question posed to other experts as well as professional staff officers of FWTAO. Still, Professor Weiler's answer is helpful. It brings together much of what other FWTAO witnesses have said. Professor Weiler testified:

A. Well, there are two different prognoses I might make about. . . what

course of events might follow . . . one of them within the existing framework, and the other without.

Within the existing framework the dilemma as it seems to me that would be presented to [FWTAO] is this: It is subject to a one-way ratchet-like effect in a sense. It can lose members to the OPSTF, but it can't win members. It can't win members for two reasons. First of all, it wants to remain a women teachers' association, and so it doesn't want to take men from OPSTF.

Secondly, it is precluded by the other aspects of the [OTF By-Law] Arrangements from, for example, taking membership from the women who are in the secondary school organization, or the separate school organization, or the Francophone school organization, all of whom are protected by the same policy of mandatory union security whose rationale I have provided.

So, within the current framework, the [FWTAO] is exposed to a problem that my sense is in the short run would be reasonably modest, but in the long run is prone to . . . disequilibrium . . . and in response to that problem one is likely to see some rather heated relations between the [FWTAO] and its counterpart public school union that may not be terribly helpful for the overall functioning of the teachers' federation or even of their joint bargaining. That is within the current framework.

The problem beyond the current framework is a sense that that is unfair. And, it doesn't take much imagination to explain why it is unfair that only the women are subject to the erosion of their bargaining organization. The sense that it is unfair might well generate pressures to erase the mandatory allocation of members as it exists with respect to rest of the Affiliates. Even assuming union security will remain for the [OTF] as a whole once one organization is made voluntary, then it becomes more difficult . . . , if not legally, but certainly politically to hold others or to allow others to take advantage of a mandatory base.

Then what one has is the situation that led to Article 20 of the AFL-CIO Constitution, the no-raiding pact, and the counterpart in the CLC, only worse because what one has then is a constant process whereby each affiliate organization has to spend as much if not more time worrying about its own base, erosion of that base by people who are supposed to be its colleagues in dealing with what is supposed to be the common target of the organization, the employer.

. . . [T]hat is the problem of a no-raiding environment that the employees and their union's resources are spent on fighting among themselves shuffling the same pieces rather than trying to expand the size of the pie for employees as a whole under this system. But, what makes it worse in this framework by comparison with the standard raiding context in ordinary labour law is that if a union wants to raid another union, before it can do so it has to sign up a majority of the

employees in that union before they can switch their allegiance from one to another. That is a much more difficult exercise.

There is a natural inhibition then, a natural self-limitation to that process that reduces its extent not even enough as far as the union movement itself is concerned. That is why they agreed to Article 20 [of the U.S. AFL-CIO] and its Canadian equivalent [the CLC]. But there will be none of that inhibition within the environment that we see here in which every individual member that . . . you attract [and take] all of that member's dues and take it away from your counterparts all of whom are otherwise supposed to be cooperating in an effort to persuade the school boards and the government to do things better for teachers as a whole.

As I say, that is not a doomsday scenario but rather pessimistic scenario . . . that I think can fairly [be] projected out of the changes in the arrangements that would be made when one affiliate, the [FWTAO] is faced with a rather unfair situation where it is the only one that doesn't have the benefits of a union security arrangement whose logic I have been trying to explain. (Tr. Vol. 70, at pp. 9421-9424.)

The "scenarios" posed are premised on assumptions that do not necessarily have to exist:

(1) *Erosion of FWTAO membership* - This will occur only if the FWTAO membership is static. The fact is, *limiting its membership to the present group of*



*female public elementary school teachers*, FWTAO membership in a period of one year grew from 37,000 to 40,000 as new female teachers were added to the system. Further, the record demonstrates that there is a larger base of female public elementary school teacher who have not been actively recruited as FWTAO members: the occasional teachers, most of whom are women, and with few exceptions they are grouped at the bottom of the wage pool. Finally, to the extent that FWTAO does indeed have programs that speak in a unique way to other women teachers, there is always the possibility of enlarging its voluntary member classification and reach. I make these points not to suggest that FWTAO move in any particular direction in terms of the development of its membership base. This is a decision solely within the prerogative of the association. Rather, I have made these comments with a view toward commenting on the *claimed fact that there necessarily would be an erosion of the FWTAO membership base if choice were allowed as to Affiliate to women public elementary school teachers*.

(2) *Defining "Choice"* - The so-called pessimistic scenario described by Professor Weiler (and to some extent by other witnesses) seems to assume some kind of right to ongoing choice on the part of female public elementary school teachers to designation of affiliate. I said before, and I repeat and emphasize here that there is simply nothing in the record to justify such an assumption. The labour relations regime operative on statutory members of OTF is unique. From the configuration of bargaining units to certification the OTF and its Affiliates are unlike any other organization in North America.

To say that there may not be discrimination on the basis of gender in compelling assignment of statutory members to Affiliates means only that a real choice is to be

made available to female public elementary school teachers. The regulations leading to the implementation of that choice, bearing in mind the relationship between the Affiliates and its unique labour history, within the context of the Relief provisions that follow, are to be established by OTF and its Affiliates.

I note without drawing any specific conclusions relative to the matter I must pass upon that there have been other occasions when the Affiliates have drafted *detailed rules relating to statutory members making choices between Affiliates when the nature of their school or teaching assignment changed. The development of junior high schools in this province provided such an example. At one point, those teaching grade nine appeared to have a one-time choice between OSSTF and either FWTAO or OPSTF.* I mention this solely for the purpose of putting a real-life context around the matter of choice. In the result, I do not believe either “pessimistic” scenario need develop from a decision allowing choice to female public elementary school teachers.

## Summary

The substantive provisions of the *Human Rights Code* take precedence over those of the *Labour Relations Act*. This is not a matter of interpretation. Rather, this is the result of express terms within the *Human Rights Code* and the *Labour Relations Act*. Yet, having said this does not mean that that reflecting labour policy is to be disregarded. Quite the contrary is true. Labour policy is to be recognized and implemented in a manner that is in harmony with the *Human Rights Code*. This is necessary in order to actualize the purposes of the *Human Rights Code* in a real-life context.

The labour regime operating on the statutory members of OTF is unique to North America. There simply is no historical precedent one can turn to for assistance in applying labour policy.

It is true that the Rand formula allows for the separation of dues payment from membership. It was and is a way to deny individuals who for a variety of reasons do not want to be union members a "free ride" for what the union as the exclusive bargaining agent for the designated bargaining unit does for all employees. In the result, all members of the Supreme Court of Canada even permitted to the use of union dues by the bargaining agent for what appeared to be non-collective bargaining purposes in the face of a section 2(d) challenge based on freedom of association under the *Charter of Rights and Freedoms*.

Such an approach simply has no place on the facts of the matter I must decide. The reason is that the challenged compulsory membership based on gender of OTF By-Law 1 does not make the Rand formula distinction between membership and dues. Quite the contrary is true: *Dues are paid because one is a statutory member. And, for our purposes that which is challenged is compelled membership based on gender.*

I find no basis in the theory of public or collective good to justify the challenged compulsory dues payment. First, it cannot be justified in the face of the holding already made finding discrimination within the meaning of section 6 of the *Human Rights Code* which is not saved by a special program as defined under section 14 of the Code. Second, the collective or public good theory under which there is recognition (as in the Rand formula) that individuals who benefit from the

general good that a union might produce should, where feasible, pay for that good, is a theory based on one trade union representing a single cohesive bargaining unit whose members have a community of interest.

The reality is, however, that two professional associations (unions) at the local level in many ways reflect a single bargaining unit. There has been and continues to be joint bargaining by and between the local WTAs and branch affiliates of OPSTF. Indeed, such bargaining and implementation of respective collective agreements in many instances is done by what are called amalgamates, which truly are organizations where the structures of FWTAO and OPSTF at the local level have been combined - albeit subject to *some important financial controls by their respective provincial Affiliate*.



## REMEDIES

The *Human Rights Code* gives a Board of Inquiry, a statutory body, the following powers in terms of remedies:

§41 - Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to proceeding, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect to the complaint and in *respect of future practices*; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000 for mental anguish.

The parties to this proceeding in a formal sense as they relate to the Affiliates are OTF and OPSTF. It has been said many times in this decision and in previous interim decisions of this Board of Inquiry that this proceeding is a result of an OTF by-law which, on the one hand, restricts OPSTF statutory membership to men and, on the other hand, requires women elementary public school teachers to be statutory members of FWTAO. The by-law emanates from OTF, a corporate entity

created by statute. And, the same statute constitutes the Affiliates as the entities who effectively control OTF through their control of the OTF Board of Governors and Executive.

The Complainants, Margaret Tomen and Linda Logan-Smith, have been denied the opportunity to become statutory members of OPSTF because of the operation of OTF By-Law 1, sections 2(a) and 2(c). To remedy the wrongs found under the *Human Rights Code*, By-Law 1, in its relevant parts to these proceedings, must be declared unlawful.

But, for reasons set out in the Order that follows, there is a clear need to *implement such a declaration. And, in my view, this implementation cannot be achieved without amending the affected OTF by-law*. In this regard, there is no suggestion in this decision that, under the *Human Rights Code*, teachers subject to the *Teaching Profession Act* may not be assigned to OTF Affiliates for the purpose of statutory membership. That which is engaged by the *Human Rights Code* in this proceeding is conditioning statutory membership on the basis of gender.

## ORDER

The following is the Order of the Board of Inquiry:

### Declaration

For the reasons set out above, I find that there has been unlawful discrimination on the basis of gender by OTF and OPSTF against the Complainants Margaret Tomen and Linda Logan-Smith. Specifically, the Complainants pursuant to OTF By-Law 1 have been denied access to statutory membership in OPSTF solely because of their gender. Insofar as that by-law discriminates as to statutory membership on the basis of gender, it is in contravention of section 6 of the *Human Rights Code*.

Those portions of the by-law referred to are By-Law 1, sections 2(a) and 2(c) which provide:

2(a) - Women teachers teaching all or a major portion of their assignment in an elementary public school or classes shall be members of FWTAO.

2(c) - Men teachers teaching all or a major portion of their assignment in an elementary public school or classes shall be members of OPSTF.

What has been stated is a general declaration as to the fundamental issue raised in this case.

## Implementation of the Declaration

At several points in these proceedings, I signalled the parties on the record that, should I sustain in whole or in part the complaints, it would be appropriate for OTF and the Affiliates to meet and propose how such a declaration should be implemented. The OTF and the Affiliates now have had a relationship a half century old. Theirs is not a simple relationship. Moreover, it is one that clearly is cloaked with the public interest. Through them, much of the primary and secondary education is delivered to the students of this province.

In the final analysis, so long as they have the will to do so, I believe it is in the public interest that the parties rather than a Board of Inquiry design the remedy of implementation of the declaration. Without limiting the scope of the parties in their efforts, the questions which the parties should address in regard to the declaration include:

- What rules of variance, if any, should govern women entering elementary school teaching for the first time?
- When and how often should women elementary school teachers be permitted to make a choice as to Affiliation membership?
- What rules, if any, should control the transition period for the taking effect of Affiliation choice?

Accordingly, I direct representatives of OTF and the Affiliates to meet with a view



toward drafting a plan for the implementation of the declaration.

The Ontario Human Rights Commission is to designate a representative who may be consulted from time to time by OTF and the Affiliates as to its position in relationship to the propriety of any proposal of plan implementation. The object of such consultation is to ensure to the extent possible that when any plan is finally approved, there will not be any substantial objection on the part of the Human Rights Commission.

It may be that an affected Affiliate will want to put any agreed-upon proposed plan to the membership of that Affiliate for approval. Of course, that will be that Affiliate's choice. However, I want to make plain that I will not be bound by any such vote or other expression of choice by an Affiliate's membership. Nor will the time lines set out in this order in any way be changed.

The parties will have from the date of this decision until September 30, 1994 to present this Board of Inquiry with a proposed final plan.

If the parties are able to agree upon a proposed final plan, and if there are no substantial objections to such a plan on the part of the Human Rights Commission, I want to assure them now that the plan will have my approval so long as it meets *prima facie* the substance of the declaration.

If the parties are unable to agree upon a proposed final plan, then they will appear before me on September 30, 1994 at which time I will receive written detailed submissions concerning implementation of the final decision. I will then set dates

for oral arguments on the submissions over a two-week time frame to be completed within one month of September 30, 1994. Further, unless and until I am instructed otherwise by a court in any appeal or collateral challenge to this decision, the parties will proceed in accordance with this section as to the Order. I do this, in part, to facilitate a *final decision* on the part of this Board of Inquiry. Such a final decision may be of assistance to a court on any review.

### **Specific Remedies as to the Complainants**

- *Statutory Membership*

It is clear that the Complainants want to change their statutory membership to OPSTF and, under the terms of the declaration, they should be able to do so. However, until a plan for implementation of the declaration is decided upon, I cannot order that their statutory membership be changed. Questions remain to be answered such as whether a choice as to Affiliate membership, once made is irrevocable. That is, does it become a lifetime choice?

However, it seems to me that to continue payment of dues to FWTAO and deny such payment to OPSTF also has its drawbacks, not the least of which may be a six-month period until a proposed final plan is determined.

Statutory dues, as the record shows, are paid to OTF from teacher salaries as they are deducted by employing boards of education. OTF then retains its share of the dues and passes the agreed upon remainder to the designated Affiliate.

In the case of the two Complainants, my ruling as to their statutory dues is as follows:

- Until a final decision is reached by the Board of Inquiry as to implementation of the declaration, the statutory dues of the Complainants shall be calculated on the basis as if they were statutory members of OPSTF.
- From the date of this decision, OTF will continue to take its agreed-upon portion of such statutory dues.
- The remainder of such statutory dues will be retained in trust by OTF until a final decision is reached by this Board of Inquiry as to the implementation of the declaration.

Technically, as indicated above, until the final agreed upon plan of implementation is ordered, the Complainants will remain statutory members of FWTAO.

- *Mental Anguish*


The mental anguish to the complainants in this litigation which has consumed so many years was evident to me in their testimony. Moreover, there is no doubt that the challenge to the gender-based OTF rules has consumed much of their personal and professional time. Yet, it cannot be denied that they have had enormous emotional support in their efforts both from individuals and organizations.

Considering these factors, it seems appropriate to me that an award to each

complainant in the amount of \$1,000.00 be and is herewith ordered. These amounts are to be paid by OTF within thirty days from the date of this decision.

IT IS SO ORDERED.

DATED THIS 31<sup>st</sup> DAY OF MARCH, 1994 AT TORONTO, ONTARIO.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal flourish extending to the right. The signature is positioned above a dashed horizontal line.

D.J. Baum, Board of Inquiry